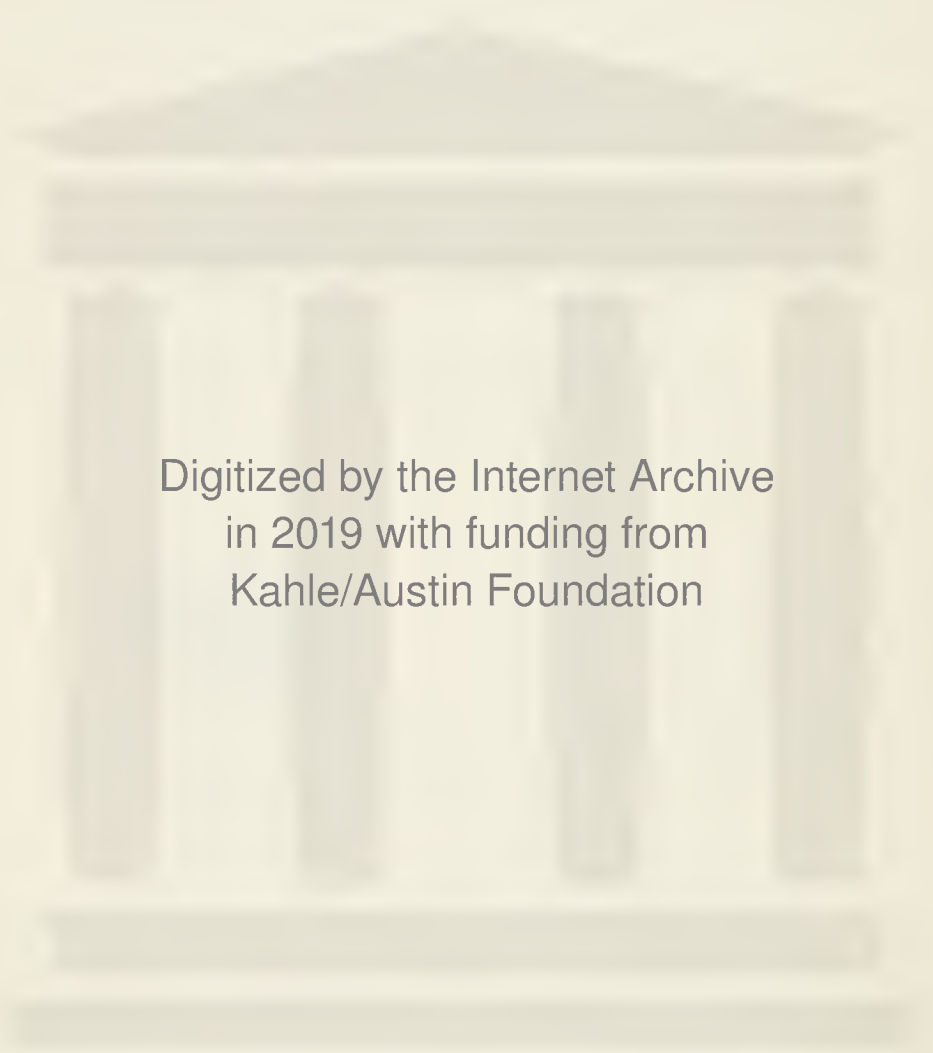


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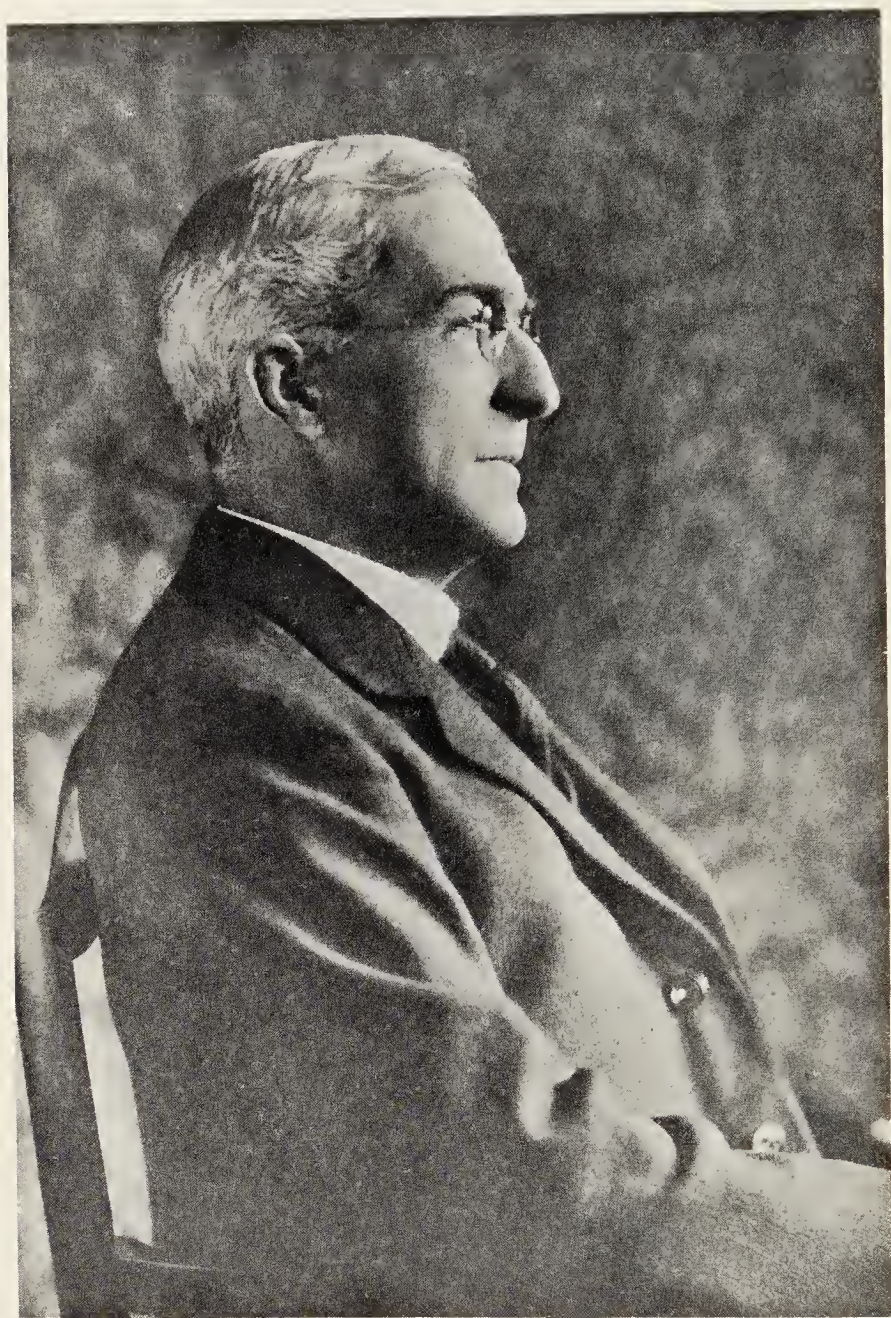
Oxford University Press, Amen House, London E.C.4

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
BOMBAY CALCUTTA MADRAS KARACHI LAHORE DACCA
CAPE TOWN SALISBURY NAIROBI IBADAN ACCRA
KUALA LUMPUR HONG KONG

First edition 1935

Reprinted 1962

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Lafayette St. photographers

Emery Walker Ltd. photo

Professor Alexander Pearce Higgins

THE
BRITISH YEAR BOOK OF
INTERNATIONAL LAW
1935

SIXTEENTH YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO

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1935

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PROFESSOR PEARCE HIGGINS

By ARNOLD D. McNAIR

By the death of Professor Alexander Pearce Higgins the *Year Book* loses one who was a member of its original Editorial Committee and who for the last fifteen years has been one of its editors. His connexion with it was one of many occupations and to none of them was he readier to give his best work. The excellent terms on which he always stood with his former pupils and younger colleagues—one of his most distinctive characteristics—enabled him both to enlarge the sources on which the *Year Book* could draw and at the same time to give himself the pleasure of encouraging younger workers to make a public appearance in the field of International Law.

As in the case of so many international lawyers, Pearce Higgins's early legal interests lay elsewhere. On leaving the Worcester Cathedral (King's) School he was articled to a solicitor and passed the Solicitors Final Examination. He then came up to Downing College, took the Law Tripos in 1891, and, instead of returning to practice, settled down to teach law at Cambridge. His earliest books were entitled *Employers Liability on the Continent* and *Elements of Agricultural Law*. In 1904, when he took the degree of LL.D., he published a short book containing translations of the Hague Conventions of 1899 and of some other Declarations and Conventions relating to the laws of war together with notes, and thus definitely associated himself with the branch of international law which was to be his main occupation until the end, though his interest in maritime law in time of peace as well as in war must not be overlooked. This book was the germ of his much larger and most important work, *The Hague Peace Conferences*, published in 1909, containing the texts of the Hague Conventions and several other conventions and declarations relating to war and neutrality with careful and detailed commentaries upon them. In the nature of things there was not much scope for originality of outlook in such a work, but, judged from the standpoint of utility, it had a very great success, and the prices at which, being out of print, it changed hands during and just after the war might well have received the attention of the Profiteering Act. His *War and the Private Citizen*, published in 1912, was an excellent popular exposition of topics which were already beginning to engage the public mind.

In 1908 he became Lecturer in International Law at the London School of Economics and Political Science (later becoming Professor in the University of London), and in the same year he was appointed lecturer at the Royal Naval War and Staff Colleges, a post which he held for twenty-five years and which made the strongest possible appeal to him. No Navy Leaguer could be more devoted to the British Navy than he was. When the war broke out he was appointed Adviser in International Law and Prize Law in the Departments of the Procurator-General and Treasury Solicitor and was soon immersed in his own special field of law, holding a number of briefs and advising in most of the leading cases in prize. Soon after the outbreak of war he published a pamphlet entitled *Armed Merchant Ships*, written in July 1914, and in 1917, when the matter had become acutely controversial, he amplified it under the title of *Defensively-Armed Merchant Ships and Submarine Warfare*. He edited Hall's *International Law* in 1917 and 1924. At the Peace Conference he was adviser to the Admiralty on international law. He was appointed C.B.E. in 1917 and a King's Counsel in 1923, and in 1928 was elected a Fellow of the British Academy.

In 1920 he succeeded Oppenheim as Whewell Professor of International Law at Cambridge. As a lecturer Pearce Higgins was too conscientious to rely upon the inspiration of the moment; he devoted much time and care to the preparation of his lectures, delivered them in a lucid and businesslike manner, and was at his best in dealing with some current topic of public interest. He was anxious to encourage advanced work and for those who wanted to work in his own particular branch of law he was able to unlock a store of practical knowledge such as few professors of international law have possessed. His approach to international law was twofold—either historical, as shown by articles upon Grotius, upon the Monroe Doctrine, and upon the Papacy and by his contributions to the *Cambridge History of the British Empire*, or topical, as appears from many articles and pamphlets, the most important of which were re-published in his *Studies in International Law and Relations* in 1928. His published Hague Academy lectures are entitled *Le régime juridique des navires de commerce* (1930) and *La contribution de quatre grands juristes britanniques au droit international: Lorimer, Westlake, Hall et Holland* (1933). His interest in the philosophical side of the subject was slight and he but rarely ventured into this field. His close contact with the legal realities of maritime warfare and his connexion with the Navy

coloured his whole outlook, and he was inclined to be intolerant of any rule or institution which seemed likely to place limits upon the power of the great navies. Greatly as he valued the honour of lecturing at the Harvard Law School for some months in 1927, I fancy that his brief visit to the United States Naval War College made a special appeal to him. He was fortunate in that during the most active period of his career the interests which lay closest to his heart were most in demand. From 1909 onwards the main popular demand made upon international lawyers was for information and advice as to the legal regulation of warfare and the legal effect of war. This demand gave Pearce Higgins his chance and he took it. It is perhaps not surprising that the impressions of those days made it a little difficult for him to accommodate himself to post-war views as to the place of law in the international community and the restraints upon the earlier liberty of action of Great Powers and their use of force which the acceptance of those views entails.

He was an Honorary Fellow of Downing, his first college, and a Fellow of Trinity. In the institutional life of international lawyers he filled a number of posts of importance, being up to the time of his death a member of the Permanent Court of Arbitration, President from 1929 to 1931 of the Institut de Droit International, Professor of the Hague Academy of International Law, and a member of the Curatorium of the Academy. He was a man of great industry and a strong sense of duty, and nearly all his published work, in the *Year Book* and in many other periodicals, was inspired by the feeling that it was his duty to express opinions and give guidance upon matters of contemporary public importance.

It is fitting that a notice such as this should be mainly devoted to attempting an estimate of the place of Pearce Higgins in the practical work and the literature of international law, but it is impossible for one who became his pupil nearly thirty years ago and very soon after his friend to be content to do this. He was one of those fortunate men in whom those with whom he came into contact in every walk of life, be it humble or distinguished, practical or academic, intellectual or the reverse, could hardly fail to detect quickly a certain common humanity and love of companionship with his fellow beings. He was a singularly unselfish and kindly man, every bit as much interested in a friend's family, his good and ill fortune, his ambitions and failures, and all the things that are usually of no importance to any one but oneself, as he was in the matters which particularly touched himself and his own

work. For instance, I was constantly struck with his intimate knowledge of the personal and family circumstances of his colleagues of the Institut de Droit International and the close terms of friendship which he established with so many of them. He had the gift of rapidly ripening acquaintanceship into friendship with those to whom he felt drawn, and it was rare for him to remain on terms of a merely official relationship. But to those who have been in close contact with him, especially in recent years, the outstanding qualities will always seem to have been his courage in the face of much anxiety and latterly of bad health, his manliness and refusal to complain, his willingness to "taste the whole of it", and his devout faith.

THE "PURE" THEORY OF INTERNATIONAL LAW

By J. WALTER JONES, Fellow of Queen's College, Oxford

THE growing recognition of the essentially legal character of the rules grouped together under the name of international law, however gratifying it may seem to some as a step in the march of international progress, has increased rather than diminished the number of problems which the theory of law has to face.¹ For one of the aims of any legal science or any philosophy of law must be to establish some unity underlying the multiplicity and complexity of rules of law; and the use of the term law to include two bodies of rules apparently so dissimilar in the relations with which they deal, in the nature and effectiveness of their sanctions, in the degree of cohesion and recognition to which they have attained, has seemed to many to produce a dualism in the legal sphere which makes more difficult than ever the task of arriving at a unitary conception of law.

Most writers have accepted the dualistic standpoint as a matter of course and it was worked out in all its implications in the well-known work of Triepel.² By consistently adhering to the principle that the only possible persons in international law are states as such, it seemed possible to sever every link between international and municipal law. The two systems are conceived as regulating two mutually exclusive sets of relations which can never by any possibility be identical in content. From such a point of view it is meaningless to speak of conflict or rivalry, of superiority or subordination; and what is sometimes described as reception of rules of the one system by the other turns out to be rather transformation of the one into the other. It is conceded that rules of municipal law may be helpful or even indispensable for the fulfilment by a state of its international obligations, but they do not thereby become part of international law. The performance of a treaty, in particular, is the duty of the state alone, for individuals can never be directly affected by the terms of an international engagement;

¹ Of course, there are not wanting writers who deny that international law is true law—Austinians like Somló (*Juristische Grundlehre*, p. 170), who regard it as no more than rules of convention, idealists like Burckhardt (*Die Organisation der Rechtsgemeinschaft*, p. 396), who speak of it as "just" or "right" rather than as positive law, and realists like Lundstedt (*Superstition or Rationality in Action for Peace*, p. 197), who say flatly that there is "between nations not even a trace of real law".

² *Völkerrecht und Landesrecht* (1899).

any duties imposed upon them flow directly from the law of their state. International law knows nothing of the individual as such. His state may be internationally liable as a result of his conduct, but this liability will be on its own account for an international wrong, and not on the ground of any alleged participation by the state in the municipally wrongful act of the national.¹

Here was a problem similar to that raised by the belief in the existence of a law of nature existing side by side with the law of the state. How could there be a juxtaposition of two bodies of rules, both of which were accepted as legal in character, but not, or not necessarily, consistent in content? It was the difficulty of working out any harmonious theory of law equally applicable to two such systems which was the main factor in the attempts made from time to time to place legal philosophy on a purely positivist basis, free from all suspicion of the doctrine that any rule of the positive law is not law, or that any non-positive rule is law. Of these perhaps that of Bergbohm has exercised the greatest influence upon later writers who have been concerned with the theory of international law.² For he was not content to reject the claim of natural law to the name of law; he went further and pointed out the consequences which have to be faced when a rigidly monistic method is applied within the legal sphere itself. Law as the object of a specific science should, in his view, be kept free from any admixture from other sources; it must be complete, homogeneous, and exclusive. How then can rules which are regarded as intrinsically different in nature still be rules of law? If municipal and international law, or for that matter public and private law, are indeed law, they are equally suited for the application to them of the same scientific method and must be accorded their proper place within the same domain of study; if, on the other hand, they are not law in the same sense, any reference to the one will exclude all concern with the other. It then becomes meaningless to speak of a treaty as binding in international but not in internal law, or of an Act of Parliament as contrary to the law of nations. A consistent theory of law demands that international law be either frankly welcomed into the field of law or rigidly excluded from it.

¹ Oppenheim took the same view: "International and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches—but separate branches—of the tree of law." Introduction to Picciotto, *The Relation of International Law to the Law of England*, p. 10. Also Anzilotti, *Cours de droit international* (trans. of *Corso di diritto internazionale*, 3rd ed. by Gidel), p. 57. ² *Jurisprudenz und Rechtsphilosophie* (1892), esp. pp. 96, 97, 109–22.

We have here in germ the "pure" theory of the Vienna School.¹ But while Bergbohm's references to the relation between international and municipal law were merely incidental to his onslaught upon all *Naturrecht*, wherever it raised its head, Kelsen, accepting international law as "law properly so called", was compelled to consider more carefully the precise connexion between it and the law of the state.² Moreover Bergbohm's conception of positive law as a system of rules operating in the external world as a practical and effective influence upon human conduct, was completely unacceptable to a theory which, in the interests of purity of method, turns over to sociology or psychology or natural science the consideration of the process by which law receives its content or is realized in practice. The science of law in this view will confine itself to legal rules considered exclusively with regard to their validity as law and not to their content as regulating men's conduct. If any kind of systematic relation is to be established between international and municipal law, the unity in the concept of law, implied in scientific method, must manifest itself in the treatment of the two bodies as forming together one and the same legal system. There is in fact no middle course between isolation and unity. The laws of different states, again, if they are to be regarded as an integrated whole, must trace their validity as law from some system from which they are logically derived. This system can be none other than international law. In this sense—the only one possible to a science which claims to deal with obligation rather than causation—we can speak of international law as superior, i.e. logically more comprehensive, and of municipal law as subordinate.³ For what are the alternatives? If international and municipal law are independent and disparate there can *ex*

¹ The expression "pure science of law" is to be found before Kelsen. See Bergbohm, *op. cit.*, p. 279, n. 4.

² See especially *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920; 2nd ed. 1928); also "Les Rapports de système entre le droit interne et le droit international public", *Recueil des Cours, Académie de Droit International*, Vol. XIV (1926, iv), pp. 231–331; *Allgemeine Staatslehre* (1925), pp. 102–32; "Théorie générale du droit international public, problèmes choisis", *Recueil des Cours*, Vol. XLII (1932, iv), pp. 119–349; *Reine Rechtslehre* (1934), pp. 129–54. That the "pure" theory required the recognition of the unity of international and municipal law was first suggested by Verdross; see literature cited by Kelsen in the introduction to *Hauptprobleme der Staatsrechtslehre* (2nd ed. 1923), pp. xxii–xxiii.

³ The use of the word "municipal" in this connexion in England, in so far as it suggests a parallel to the relation between Acts of Parliament and by-laws of local authorities, expresses what Kelsen has in mind. He himself would prefer "supra-national" to "international" for the name of the wider system but for the associations which have come to be associated with the corresponding term "super-state".

hypothesi be no scientific relation whatever between them. A dualistic construction is not really dualistic at all,¹ for if, as is usual, we start from the standpoint of the sovereignty of the state system, treating it as exclusive of all others, we are not merely excluding international law from consideration but annihilating it as law, because we are denying its legal character.² And once we reject isolation we are driven to the principle of delegation, for co-ordination would mean acceptance of the assumption of a third system embracing the others in a still wider unity.

Nor can the two systems of law be distinguished by pointing to a difference in the relations which they respectively govern. To Kelsen the state is not, as to Triepel, a number of individuals possessing supreme power over a community and occupying a position which forbids any comparison of international relations with relations within the state; it is rather the name for the personification of a complex of rules. Legal science finds the unity of the state, the people, the territory, not in the leader or leaders who govern but in the unity of the legal order.³ The difference between international and municipal law is only one of rank in the hierarchy of legal rules. All rules have men's conduct as their subject-matter and when we say that international law deals with the relations of states as co-ordinate subjects, we mean simply that the men with whose conduct it deals are not affected in their individual capacity but as organs or representatives owing their position as such to rules of municipal law. International law determines what is to be done, but delegates the further determination of the individual who is to do it to be established by municipal law. In asserting that international law does not bind individuals the transformation theory is really denying that its rules are binding at all, for none but individuals can ever be bound.

From the two propositions, that the separation of two legal systems can at best be only provisional and that there can be no difference between the relations governed by municipal and international law, the conclusion is drawn that municipal law stands

¹ Apart from the fact that dualism here really means pluralism.

² Some writers frankly accept the position that international law is only a name for a number of bundles of the laws of different states. See Walz, *Völkerrecht und staatliches Recht* (1933), pp. 51–64, for a recent discussion of this brand of pluralism.

³ "The theory of the nation-state is a theory of law." *Allgemeine Staatslehre*, p. 149. This rejection of the principle of authoritarian leadership as the unifying element in nation, and therefore in state, is characteristically derided by the legal apologists of the present régime in Germany as "the last gasp of a decadent radical Liberalism". Koellreutter, *Vom Sinn und Wesen der Nationalen Revolution*, p. 16.

to international law as the law of states bound together in a federal union stands to the law of the union, or as the statute of a corporation or the regulation of an administrative body or official to the law of the state itself. The validity of one rule of law can come only from another rule—this is axiomatic in the pure theory of law—and if we follow unfalteringly the course marked out by the compass which points from rule to rule we are promised the vision of law as a great pyramid rising from the broad base of a myriad of daily juristic acts to its peak in the final principle from which the international system itself is derived. Each rule is contained *in nuce* in a higher rule of which it is a more concrete manifestation and, with the exception of the highest (a pure abstraction) and the lowest (simple application without any further creation of law), every rule combines in itself the functions of producing and applying law at one and the same time.¹

It need hardly be said that such a theory involves a revision of the traditional doctrine of sovereignty. Verdross² thinks that the term should now be abandoned since there can no longer be any question of the state being sovereign in the sense of possessing supreme power or of representing the last step in the legal hierarchy behind which we are brought up against a condition of fact or force inaccessible to legal science. Kelsen, on the contrary, still regards the notion of sovereignty as indispensable provided that it is never forgotten that the state is another name for municipal law. When viewed from within the state system itself, the sovereignty of the state becomes simply the quality ascribed to municipal law of being the last, highest, underived system, as contrasted with subordinate systems deriving their validity from it, and the expression sovereign state is seen to be a mere pleonasm. On the other hand, when we look at the state from the standpoint of international law the word sovereign becomes a symbol of the unity of the system of municipal law—a unity assumed, not now in relation to international law, but to mark off the law of the state from the sphere of morals, religion or politics. The sovereign state is just another name for positive law, and sovereignty is the declaration of independence by the lawyer who assumes, and is entitled to assume, that he is dealing with a system

¹ This principle of legal gradation (*Stufenbau*) has been worked out in detail by Merkl, *Die Lehre von der Rechtskraft* (1923), and has been welcomed by Kelsen as giving his theory a dynamic as well as a static element. See also Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaues in Gesellschaft, Staat und Recht* (1931), pp. 252–94.

² "Fondement de droit international", *Recueil des Cours, Académie de Droit International*, Vol. XVI (1927, i), pp. 314, 318.

claiming validity as a branch of study in its own right and not as part of a wider system. It is granted that a corresponding assertion may equally well be made by the moralist or theologian on behalf of his own science, for—as Austin has already implied in his use of the term “positive morality”—it is not in the absence of positiveness that morals and religion differ from rules of law. Natural as opposed to positive law assumes the existence of a system of rules deriving its validity *as law*, not merely its content, from some extra-legal source, whether this source be called reason or conscience or morals. Positiveness (of law or state) like sovereignty (of state or law) means derivation from a source, i.e. a rule, regarded as the logical fountain head of the validity of the rules forming the system, and the independence of this system rests upon the assumption that the basic rule is original and underived from any other.

Returning to the question of the relation between international and municipal law, to which the concept of sovereignty, as thus defined, is irrelevant, we are entitled to ask what is the final principle upon which international and therefore, if we accept the delegation theory, municipal law also depend. At the head of the state system, says Kelsen, stands the principle which delegates the first constituent legislature in the history of the state and sets up the primary organ, whether a monarch or a legislature, for the creation of law. This is the hypothetical or ideal constitution in contrast with the positive constitution or the body of general principles which this organ lays down. If we adopt the attitude which assumes the supremacy of the law of the land we stop at this constitution as the source from which the law receives its unity. Is it possible to formulate the basic principle of international law in the same way? At first, the principle *pacta sunt servanda* seems to have been thought sufficiently comprehensive to serve the purpose, although this was only possible by basing the customary law of nations on agreement and classing it as a species of treaty law.¹ Apart from the fact that the principle of the binding force of agreements receives all its meaning from the limits placed upon it by positive law, there are rules of international law whose origin can no more be traced to consent than the mass of the rules of municipal law; some of these, like the principle *pacta sunt servanda* itself, represent a residuum which a long course of experience and

¹ Anzilotti, *op. cit.*, p. 74, expressly ascribes the obligatory force of customary law to agreement, though it would be equally true to trace the validity of treaties to custom.

reasoning has made a part of the common stock of the law of civilized societies. Now that Article 38(3) of its Statute has expressly provided for the application by the Permanent Court of the "general principles of law recognized by civilized nations" there is ground for supposing that the *ius gentium* in the Roman sense will increasingly become a source of the *ius gentium* in the modern sense. Verdross therefore has abandoned *pacta sunt servanda* as the final source of the international system and has formulated this source so as to include within it the general principles referred to in Article 38, representing them as still another proof of the essential unity of the world of law.¹

There has also been a change, or inconsistency, of attitude towards the question, which system we shall adopt as supreme over the other. The difference between the two being in the end one of sources, i.e. of rules assumed to be final for the purpose of deriving the positive law from them, our decision cannot, thinks Kelsen, depend upon the positive law itself, for this would imply the acceptance of the one postulate or the other, which is the very point at issue. It is therefore idle to adduce provisions of state law enacting that international law, whether in general or in the form of treaties, is to be part of the law of the land, in support of either thesis. Nor can a rule of positive law be conclusive on a question of scientific method. From the legal point of view there will be a purely arbitrary choice of one or other of two mutually exclusive hypotheses. As long as the theory remained a consistently formal one of this kind, leaving the choice of hypothesis perfectly open, the actual decision could hardly be the subject of criticism. The most that could be said was that the principles, between which the choice lay, were not properly formulated to serve the purpose of sources from which the rules of the system could be logically derived.²

But it seems to be the fate of formal theories of law at some time or other to undergo a metamorphosis and to put forward generalizations as to the content of legal rules. Kelsen has been no more successful in avoiding this than was Stammler. For in deciding

¹ *Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle in Gesellschaft, Staat und Recht*, p. 362, where the formula is enunciated thus: "Communities, sovereign or part-sovereign, regulate your conduct in your relations with one another according to the generally recognized principles of law, so far as they have not been modified by rules which international usage has established as valid." For an enumeration and discussion of these "principles of general jurisprudence" see Verdross, *Verfassung der Völkerrechtsgemeinschaft* (1926), pp. 57-67, and Lauterpacht, *Private Law Sources and Analogies of International Law*. At present they appear to be regrettably few in number.

² Spiropoulos, *Théorie générale de droit international*, pp. 56-63.

for the primacy of international law he has given the juristic hypothesis a "political core"—the ideal of the legal unity of mankind at large—which in turn he links up with an ethical *Weltanschauung*. The primacy of the state system is represented by him as the acceptance of a subjectivism proclaiming the absolute validity of personal desires and giving birth to the twin evils of imperialism in world politics and anarchism in the theory of the state.¹ Verdross has gone further still by explicitly abandoning Kelsen's standpoint that the basic principle is a formal hypothesis. If positive law as an actually existing system is to be derived from it, such a principle cannot, says Verdross, be a hypothesis existing solely in the mind of the jurist and without any ethical relevance. It should rather be framed as a postulate possessing ethical as well as juristic content and, though relative to the changing conditions of civilized life, finding its justification in some absolute conception of justice.² This new departure has opened the way for criticisms on philosophical and political grounds, which would have been out of place if the theory had remained "pure". So difficult is it for a professedly formal theory of law to resist altogether the seductive, if delusive charms of speculation into the absolute.

This difficulty of drawing a sharp distinction between formal validity and material content is also shown in the treatment of the possibility of conflict between international and municipal law. It is a consequence of the delegation theory that in cases of apparent conflict the rule of municipal law is simply null and void, legally non-existent. The essentially static character of Kelsen's theory does not admit the alterability of the law as a self-evident truth. The principle *lex posterior derogat priori* must rather be shown to be contemplated by a rule of positive law standing higher in the legal hierarchy. Since international law does not contain any rule allowing abrogative force to municipal law, it follows that municipal law must always give way. And again there can be no question of state legislation constituting an international wrong. The dilemma is similar to that which has arisen in connexion with corporate liability in municipal law. If a corporation

¹ *Allgemeine Staatslehre*, p. 131; *Problem der Souveränität*, pp. 314–19.

² *Verfassung*, pp. 23, 35; *Fondement*, p. 286. Now that *pacta sunt servanda* has given way to a new formula incorporating the "general principles" of Article 38 it will certainly not be less difficult to discover an ethical value in the basic principle of international law. Cf. Brierly, "Le Fondement du caractère obligatoire du droit international", *Recueil des Cours*, Vol. XXIII (1928, iii), p. 548.

owes its legal personality and capacity to the law, how can it be responsible for an act contrary to law? The practical considerations which have outweighed such theoretical objections in the common law do not prevent Kelsen from dismissing the whole notion of a state wrong as a flat contradiction in terms.¹ How is it possible to say that an act contrary to international law is to be attributed to the complex of rules of which the state is the personification and which owe their legal validity to international law itself? Such a conclusion can only be reached by adopting the hypothesis of the supremacy of municipal law, which, says Kelsen, is as much as to say that international law is not law at all, with the consequence that the act cannot be unlawful. "In legal science *Rechtssubjekt* and *Unrechtssubjekt* can no more be identical than God and the Devil in Christian theology."² The problem of the validity of state legislation contrary to international law only arises if we accept the monistic position for the act of legislation, and the dualistic for the rule when once it is laid down. .

Such a train of reasoning may seem decisive to those who feel the need for a completely homogeneous and unified theory of law; but it seems to fly in the face of the facts of the present day. Few will deny that conflicts between international and municipal law are undesirable in practice. Apart from the constitutional provisions which in some states are designed to reduce them to a minimum, there is the generally accepted rule of interpretation, that conflicts are not to be presumed in the absence of a clear intention. All this, however, is so much more proof that conflicting rules can and do exist side by side, and if there is one proposition clearly recognized by both international and municipal law, it is that a rule which is opposed to the former may yet be binding in the latter.³ Nor will conflicts be avoided until the doctrine of the supremacy of international law has been recognized by legislatures and applied by judges,⁴ and some sort of direct relation

¹ Even in the Common Law it is not yet admitted that a corporation can be held responsible for damage caused by an act which is *ultra vires* of the corporation. Salmond, *Torts* (8th ed.), p. 57.

² *Problem der Souveränität*, p. 147, n. 2. Of course, Kelsen does not mean that there is no liability but only that it falls upon individuals, and in his view individuals, separately or collectively, can never be identified with the state. See *Théorie générale*, p. 148.

³ "The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations under the Geneva Convention." *The Case concerning certain German interests in Polish Upper Silesia. Publications of the Permanent Court, Series A, Collection of Judgments*, No. 7, p. 19.

⁴ Walz, *op. cit.*, p. 218, cites a decision of the German Reichsfinanzhof (7, xii. 1926) in

between municipal and international courts, particularly the Permanent Court, has been set up. As long as courts dealing with the same matters are divided vertically or horizontally with some measure of independence, so long will a system which is completely unitary, in the sense that contradictions somehow cancel themselves out, be a dream. It may be true that legal validity and legal obligation can only proceed from rules of law and not from the men who make them, but rules do not apply themselves and government is by men not by laws.

But here the answer is given that formal unity is not affected by material disunity. The unity of municipal law is not destroyed by the existence of statutory provisions inconsistent with the terms of a written constitution in a state where the judges have no power of judicial review or where this power is exercisable only subject to conditions or at the instance of certain state organs. Why then should the formal unity of international and municipal law be destroyed by material conflict between individual rules of the two systems? Cannot a statute passed in the face of the terms of a treaty be compared to a contract binding between the parties but exposing them to the payment of a penalty? These analogies will remind English lawyers of the way in which writers have smoothed out the conflicts between law and equity or between civil and criminal law; they at least make it clear that formal unity allows room for a surprising amount of material disunity. And Verdross appears to give away his whole position when he concedes that "a rule can be valid in one connexion but invalid in another", for this is precisely what the dualistic school has always maintained.¹

Perhaps the strongest argument in favour of the delegation theory is that the birth and death of states, though beyond the reach of the rules of municipal law, form the subject-matter of rules of international law. International law delimits not only the territorial but also the temporal validity of the law of the state, though to its own courts, says Kelsen, the state system in its totality must be vested with the attribute of immortality. It follows that recognition by other states can at the best have declaratory, never constitutive, effect, for it is only by satisfying

which, on the contrary, the "transformation theory" of Triepel was expressly referred to and adopted.

¹ *Verfassung der Völkerrechtsgemeinschaft*, pp. 36-8, where he speaks of "relative" validity.

conditions prescribed by international law, to which these states are themselves subject, that the new state comes into being.¹ Indeed, to speak of recognition at all,—whether of the new state by others, or of international law by the new state—begs the question by assuming the existence of the state prior to recognition. In the same way, if revolution does not destroy the essential continuity of a state, this can only be due to international law, for it is only in the international system that revolution can take on a legal aspect. Within the state the breach in legal continuity can only be explained by reference to extra-legal postulates with which the law has nothing to do. The gap between the old order and the new can never be bridged by a new rule within the state system itself, for such a rule would imply the acceptance of the new source or constitution which *ex hypothesi* excludes the existence of that which it has displaced. Nevertheless it is an undoubted rule of international law that the rights and duties of the state towards other states are unaffected by revolution, because the identity of the state as an international person has not been destroyed.² Is not this the crowning proof of the supremacy of international law? Facts which the other system is powerless to interpret in terms of law are now transmuted into legal principle. The thread which binds together every rule of law has never been severed after all, and there is still an unbroken link between the lowest concrete application of law and the ultimate principle upon which the whole fabric depends.³

But when we examine more closely the meaning of the claim that international law gives to the "order immanent in the facts" (i.e. of revolution) the dignity of law,⁴ we find something near to the complete abandonment of the premisses from which the doctrine started. For we are told that this identity of the state, which remains unaffected by revolution, consists in the fact of a settled order under a recognized government with dominion over a certain territory and people. The state as a complex of rules

¹ See also Fischer Williams, "La Doctrine de la reconnaissance en droit international, et ses développements récents", *Recueil des Cours*, Vol. XLIV (1933, ii), pp. 203-314, esp. pp. 236-7.

² "This internal change in the system of government, when once the new government is recognized in this country, has no effect on the external status of Russia *quoad* this country as a personality in international law. The identity of the state remains the same for international purposes; the change from monarchy to republic does not, in general, abrogate treaties or conventions any more than loss or increase of territory." *Lazard Bros. v. Midland Bank Ltd.*, [1933] A.C. 289, at p. 307, *per* Lord Wright.

³ See also Merkl, *Die Lehre von der Rechtskraft*, pp. 275-96.

⁴ Kelsen, *Rapports de système*, p. 309.

imperceptibly becomes the state as an historical fact, and the pure theory of law proves to be not so far removed from the traditional doctrine which in its extreme form becomes the creed of "blood and soil".¹ This happy coincidence of the two realms of law and fact is no doubt implicit in Kelsen's admission that his science is one of positive law which presupposes some irreducible minimum of efficacy or of expression in men's outward conduct. But it can hardly be described as a triumph of law over fact.² Moreover, it will be noted that at this point the delegation theory has itself invoked an "undoubted", i.e. positive, rule of international law, and it is therefore permissible to turn to the actual law of states on the subject of revolutionary change of government. In the first place, there are decisions of French and German courts to the effect that a revolution does not even destroy the whole of the constitution, which may continue in force in so far as its provisions are compatible with the change in political conditions.³ Thus, however illogical it may appear, it is not necessarily true that revolution cuts so deeply into the municipal system that the body legal, unlike the body politic, is unable of itself to heal the wound without recourse to international law. And again it has never been seriously asserted that in practice the general mass of the rules of the civil and criminal law loses its validity. Even Verdross is prepared to admit that the state continues to have a "potential" existence,⁴ so that the disappearance of the government which forms the indispensable link between international and municipal law may leave both the higher and the lower system undisturbed; and the theory which derives the whole of the state system from international law shows itself to be no more than a logical expedient to preserve a formal unity of the two, analogous to Austin's celebrated formula that "what the sovereign permits he commands".⁵

¹ It was not to be expected that this recognition of the force of facts would make the pure theory of law more acceptable to the nationalist school of legal theorists at present dominant in Germany, who complain (contrary to the fact, see *Allgemeine Staatslehre*, p. 149) that the word nation is not to be found in the whole of Kelsen's theory. Koellreutter, cited in Sauer, *Lehrbuch der Rechts- und Sozial-Philosophie*, p. 65, n. 48.

² Walz, *op. cit.*, p. 103.

³ Herrfahrdt, *Revolution und Rechtswissenschaft* (1930), p. 85; Walz, *op. cit.*, pp. 107, 132.

⁴ *Verfassung*, p. 128; it is difficult to see how the rules as to the existence and continuance of states themselves can be derived from *pacta sunt servanda* or from the "general principles" of Article 38 of the Statute of the Permanent Court.

⁵ A parallel to the Austinian principle is found by Verdross in the reference in Article 15(8) of the Covenant to "a matter which by international law is solely within the

It was perhaps natural that the reaction against the view that international and municipal law are by their nature mutually exclusive should have carried the pure theory of law to the other extreme. It is always difficult for the exponents of a doctrine which has become associated with a "school", and has attained the dignity of a system, to make any concessions to those who remain unconvinced. What can hardly be denied is that the tie between international and municipal law is closer than that between the municipal systems themselves. The maxim that international law is part of the law of the land is indeed true only in a very loose sense and, as things stand at present, does not remove the necessity of express adoption of international rules by municipal law, although this adoption may in the individual case be merely by application of a general rule or presumption in favour of the international system. But the very frequency with which the maxim has been cited in municipal courts is at least evidence that the attitude of judges to international law differs completely from that taken by them to foreign systems the rules of which have to be proved as a fact in each case.¹ For adoption, though indispensable for incorporation in the state system, is obligatory.² Where an admitted rule of international law requires for its enforcement to be adopted by municipal law the state is bound to adopt it and there is probably no state whose judges, in the absence of a clear provision of municipal law, will hold themselves free to disregard it, where the rights and duties of individuals are affected. After adoption the rule continues to be a rule of international law, for it still involves the responsibility of the state,

domestic jurisdiction" of a party. The comparison drawn between these matters and the so-called "rights" reserved in constitutional declarations (*Verfassung*, p. 174) is unfortunate, in that it suggests that they possess a sanctity placing them permanently beyond the reach of international law.

¹ "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations." *The Scotia*, 14 Wall. 170, cited Moore, *Digest*, Vol. I, p. 11 (Hudson, *Cases*, p. 714). Cf. Picciotto, *op. cit.*, p. 104, for the view that international law must be proved as a fact in English courts, following Salmond, who, however, later abandoned judicial notice as the test of the distinction between general and special (including international) law, describing it as "formal and superficial" and not always applicable. *Jurisprudence*, 8th ed., p. 104, note. On the other hand municipal statutes have been declared by the Permanent Court to be "merely facts which express the will and constitute the activity of States in the same manner as do judicial decisions and administrative measures" when viewed from the standpoint of international law. *Case concerning German Interests in Polish Upper Silesia*. *Publications of the Permanent Court, Series A, Collection of Judgments*, No. 7, p. 19.

² This was the attitude adopted in *Engelke v. Musmann*, [1928] A.C. 433: "The privilege itself depends upon maintaining the obligations of international law and the comity of nations"; *per* Lord Buckmaster, at p. 446.

and the enforcement of it within the state by the judiciary does not operate to transform it into something new.¹ That there is nothing in the nature of the relations with which the two systems deal to prevent unity, is shown by the use of municipal decisions by the Permanent Court and by the converse process in state courts.² Where the two rules are so inextricably intermingled unity seems a more appropriate description of the relation between the systems than dualism.

But, when all this is conceded, there still remain a multitude of rules of municipal law which have and can have no international significance whatever. And the conclusion that the competence to enact such rules is derived from international law because the birth, death, and continuity of states are the subject-matter of rules of international law, although it may serve the purpose of providing that unity of all legal rules which the pure theory of law regards as indispensable for legal science, will seem meaningless to those who do not feel the need for such formal logic.³

Whatever may be thought of Kelsen's attempt to bring international and municipal law together in an indissoluble unity it is difficult not to sympathize with his rejection of the psychological approach to the problem of legal obligation. The theory which founds the basis of the validity of international law on an aggregate or union of the wills of states had never been able to explain how the empirical description of the origin of the content of rules

¹ "The second group of rules of international law prescribes conduct for private persons and public officers. Such rules may be effectively enforced, may be rules of law in the Austinian sense, through concurrent enforcement by the municipal law of all civilized countries, yet they continue to deserve the name international law because it is on account of the pressure of international public opinion that they are thus concurrently enforced by states. States are held internationally responsible for their observance." Wright, *The Enforcement of International Law through Municipal Law in the U.S.*, p. 219. To the same effect Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", *B.Y.I.L.* (1929), p. 77. Wright's standpoint is in some ways closely akin to Kelsen's: "International law is not to be distinguished from municipal law by the assertion that the former relates to the conduct of states, the latter to the conduct of individuals within the state. Not state conduct, but state responsibility is the criterion of international law" (p. 12).

² Mr. Moore's opinion in the *Lotus* case (*Publications of the Permanent Court, Series A, Collection of Judgments*, No. 10, pp. 65-94) and *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161 at p. 173 are instances on either side.

³ The words "formal" and "material", often used in this connexion, are clearly ambiguous. When Lauterpacht speaks of rules of international law adopted by municipal law as formal state law (*loc. cit.*, p. 75) and Walz describes them as formal international law (*op. cit.*, p. 244) the word "formal" is obviously being used in different senses.

can provide a legal basis for their obligatory force. States enter into agreements, but the analysis of this fact in terms of psychology leaves unsolved the problem why treaties are binding even after the will to be bound has disappeared. Moreover, even some of the exponents of the will theory have been forced to admit that to the lawyer the will of the state must in the end be a legal rather than a psychological concept.¹ The will of the state as creative of international law seemed to have no meaning apart from the law, and Kelsen only took the final step when he identified the will of the state with the law itself.

The pure theory of law does not assert that law is free from elements of psychological, sociological and, above all, political importance. What it attempts is to put a purely legal construction upon some of the terms which are fundamental in modern legal science—positive law, the sources of law, the sovereign state. It warns us against the habit of making legal terminology a cloak for political presuppositions and of duplicating legal ideas by setting up the personification of legal rules as something independent of the rules themselves. Nor does its value rest wholly in the field of methodology, for its conception of the state as no more than a body of rules of law helps to remind us that even the “totalitarian” state cannot embrace the whole of man’s being. For the international lawyer, in particular, there must be a peculiar attraction in a doctrine which, instead of founding the legal nature of international law upon its likeness to state law,² boldly maintains that, on the contrary, it is through international law alone that municipal law preserves its homogeneity and continuity. And if, in justifying the supremacy of international law by reference to ethical and political postulates, Kelsen, like Austin in his digression into Utilitarianism, leaves his chosen path of logical deduction, this at least may be said—that without his ideal of an international community, international law itself would never have come into existence.³

¹ Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus* (1911), pp. 85 *et seq.*

² Cf. Hall, *International Law* (8th ed.), p. 1; Westlake, *International Law, Peace*, p. 6: “a law of the society of states sufficiently like state law”.

³ Even Hall, who on p. 342 speaks of the “fiction that states which are under international law form a kind of society”, later at p. 707 refers to the “community of nations” simply, without any reference to fiction.

DELIMITATION OF RIGHT AND REMEDY IN THE CASES OF CONFLICT OF LAWS

By A. MENDELSSOHN BARTHOLDY

I. *Introduction*

1. PRIVATE international law, apart from its intrinsic difficulties, has always suffered and sometimes almost seemed to collapse through its faulty and vacillating terminology. Comparative law stands in such close natural relation to private international law that it might be expected to have cleared away a few at least of the misunderstandings which the different use of similar expressions among Anglo-Saxon and Continental European jurists has caused in this matter. Unhappily that is by no means the case, and if the contribution comparative law has recently offered to the question of classification or qualification in private international law¹ is to be taken as a test it might even be found that the confusion has been considerably increased by the intervention of some of the Continental authorities on comparative law in the battles of the Internationalists.²

¹ Mr. W. E. Beckett in his article on Classification in the *British Year Book of International Law* (1934, 15 *B.Y.I.L.*, p. 46), to which the writer of the present article owes a special debt of gratitude for its excellent presentation of the theory of M. Bartin and his critics on the Continent, prefers the expression "classification" as being less ambiguous. Continental writers certainly do not realize that "to qualify" in English law may mean to limit by modifications, while in Scots law it means to prove or confirm, neither of these meanings corresponding in any way to the word qualification as M. Bartin or Dr. Lorenzen or Dr. Schoch use it. On the other hand, the term classification, both in French and German, reminds continental writers too much of the text-books on natural science and chemistry, in which systems are based on the different "classes" of animals, plants, minerals or other substances, and hardly does justice to the process of *deciding* "whether a given state of facts, or a rule of law and the right resulting therefrom, falls into one or other of these conceptions or categories of analytical jurisprudence"—Mr. Beckett's definition of the process of qualification with which we agree on every point. "Qualification" indicates exactly the process of attributing certain different qualities to different objects which were more or less nondescript before that attribution was made, instead of merely handling the different groups in which these objects already find themselves, their "classes", within a comprehensive system of categories; this latter process would only occur to the continental writer in using the term classification. Moreover, the three leading authorities on the problem in the United States, Italy, and Germany, Dr. Lorenzen, Professor Lea Meriggi and Dr. Schoch, agree with M. Bartin in using the word qualification. Might we not ask, therefore, Mr. Beckett and Dr. Cheshire, who in his *Treatise on Private International Law*, pp. 9-14, has followed him in his nomenclature, to reconsider their decision and to accept the Continental-American term, with Mr. Beckett's definition of its meaning as the authoritative explanation?

² Mr. Beckett, *op. cit.*, pp. 58-60, has another and higher opinion of their views. While criticizing some of Professor Meriggi's conclusions, he agrees with Dr. Rubel's suggestion of a possible classification on the basis of comparative law.

2. The obvious instance of such a misunderstanding is afforded by the designation of certain groups of rules of law as private international law in British and American law, *droit international privé* and *diritto internazionale privato* in French and Italian law, and *Internationales Privatrecht* in the law of the German-speaking countries.¹ The two qualifying adjectives "International" and "Private" occur in all three languages and the natural conclusion to be drawn from the fact that they are both of them loan words derived letter for letter from a common Latin source seems to be that they should mean the same thing, or approximately the same thing, with only a slight difference in mental spelling; but that is precisely what they do not.

For one thing the antithesis indicated by the term private international law (and likewise *droit international privé*) is an entirely different one from that which is evoked in the mind of a German using the expression *Internationales Privatrecht*. With English or French lawyers it is public international law or *droit international public*, the equivalent, more or less, of *droit des gens*² or the German-Swiss-Austrian *Völkerrecht*. With a German or Austrian it is *Internationales Strafrecht*,³ and *Internationales Prozessrecht*,⁴ or *Internationales Verwaltungsrecht*,⁵ that is the

¹ Criticism of the term *Internationales Privatrecht* as entirely misleading is almost as old in German law literature as the use of the term itself. It has been summed up in the paradox that the body of rules which the term tries to describe are neither *International-* nor *Privatrecht*, belonging as they undoubtedly do under present circumstances to the domestic law of a country and, according to the customary delimitation between private and public law or *Zivilrecht* and *öffentliches Recht*, to the latter and not to the former part of the domestic law.

² Compare the remarks about *droit international public* and *droit international privé* by Georges Scelle, *Précis de droit des gens*, Vol. I, pp. 45-9.

³ A few authors of handbooks on the Continent found it convenient to deal with private international law and international criminal law under the same heading, cf. v. Bar, *Das internationale Privat- und Strafrecht*, 1862, and Jettel, *Handbuch des internationalen Privat- und Strafrechts mit Rücksicht auf die Gesetzgebungen Österreichs, Ungarns, Croatiens und Bosniens*, 1893. The leading periodical in the German language was called *Zeitschrift für internationales Privat- und Strafrecht*. As to the French law, compare L. Renault, *Introduction à l'étude du droit international*, Paris, 1879, p. 26, and, contra, A. Weiss, *Manuel de droit international privé*, 9th ed. 1925, p. xxxvi.

⁴ The Swiss jurist, F. Meili, defined international procedural law as "the rules of law relating to the authority of the courts, forms and weight of evidence, and the execution of judgments by international courtésy so far as a collision between different co-existing municipal laws of procedure or different usages in the municipal courts might arise" (*Das internationale Zivilprozessrecht*, 1904), but he includes the delimitation of right and remedy, the position of aliens before the courts, procedure in respect of foreign sovereigns and foreign corporations and all questions of jurisdiction and *res iudicata* in the orbit of international procedural law.

⁵ The standard work on international administrative law, Professor K. Neumeyer's *Internationales Verwaltungsrecht* (Vol. I, 1909; Vol. II, 1921), deals specifically with such

rules governing a conflict of laws in criminal matters, matters of procedure or questions of administrative law, while *Internationales Privatrecht* means only the rules about a conflict between the civil laws of different countries¹ in the narrowest possible sense of the terms civil or private law, excluding for instance such matters as probate of a will, administration of an estate, bankruptcy, claims in connexion with social insurance, traffic laws and many other matters included in an English system of civil law. So far is the conception of a possible antithesis or a useful distinction between *Internationales Privatrecht* and *Völkerrecht* (or *öffentliches internationales Recht*) from the mind of a jurist in Central Europe that he prefers to discuss the question whether the former is not an integral part of the latter and whether private international law is not public international law after all.

3. The difference between the British and the Continental views of the term private international law becomes still more marked if we come to the problem indicated in the title of this article. With British writers on private international law this term includes, as a matter of course, such questions as the effect of foreign judgments, jurisdiction of British courts, general maritime law, foreign adjudication in bankruptcy, or the difference between substance and procedure. A treatise on private international law would seem incomplete if it did not deal exhaustively with all these questions. In a German text-book on *Internationales Privatrecht* they might just be mentioned as "verwandte Gebiete", perhaps as a kind of colonies or dominions of private international law proper. On the whole, however, they would be left to a book or a special course of lectures on international procedural law,²

divergent branches of administration as waterways and water-power, admission to liberal professions, labour, public insurance, poor law, banking, cartels, savings banks, work on Sundays and workmen's compensation.

¹ Not so much "rules which the courts of each territorial jurisdiction follow when a dispute containing some foreign element arises between private persons" as Dr. Cheshire, *op. cit.*, p. 20, defines them according to English private international law. On the Continent the character of a legal relationship is held by most writers to be independent of the fact that the persons interested in that relationship happen to be states, public corporations, or private persons. Each relationship is thought to bear the quality of a public or private "right" in its composition, and in many instances even the jurisdiction of the courts depends on that quality; the parties to a future lawsuit or their legal advisers have to find out for themselves whether the matter is one for the *ordentliche* (civil) courts as the Code calls them in Germany, or the administrative courts—or there may be no remedy at all but in the discretionary power of a government department. For a classical discussion of this question in German law see Adolph Wach, *Handbuch des Zivilprozessrechts*, Vol. I, pp. 77–114, 121–9.

² In Italian law a similar distinction is made. The late Professor Fedozzi has written

international bankruptcy law, international administrative law, and so forth.

Thus, according to the English conception, the qualification of a rule of law as being of a remedial nature and indeed the entire problem of the essential difference between substance and procedure may be dealt with as an incidental question in a closely knit system of private international law. Dr. Cheshire's treatise, which seems destined to become the standard work on private international law in England, reserves the discussion of the rule that the remedy is governed by the *lex fori*, and of the difference between substance and procedure to one of the concluding chapters of the book.¹ To an Italian jurist like Fedozzi international procedural law seemed a discipline worthy of a special treatise.

4. For these reasons we venture to think that in order to avoid further misunderstandings resulting from the different use of similar terms in several languages, jurists would do well to return to the use of the old-fashioned title "Conflict of Laws". Curiously enough, it is still extensively used in the United States, though for reasons which it seems difficult to explain it has almost completely dropped out of fashion in England. Dr. Cheshire states that the French introduced the new term and seems to indicate that British writers headed by Westlake only followed suit; but the French courts certainly have remained loyal to the older term of *Conflit des lois* which it should be remembered was used in its Latin form by the fathers of all modern knowledge of this matter. M. Weiss in his *Manuel de droit international privé* (page xxxiv, note 1) ascribes the invention of the new term to Story and to a forgotten German Internationalist of the name of Schaeffner. In any case *Collisio Statutorum* in northern Italy led to the first fruitful discussions about our subject-matter. Mr. Beckett objects to the use of the old term on the ground that it seems to emphasize the contingency which the rules of private international law are meant to prevent. Rules for avoiding a conflict of laws, he

a treatise on *Il diritto processuale civile internazionale*, of which the general part appeared in 1905 and in which he would have dealt with international procedural law, including the delimitation of right and remedy from the point of view of the remedial jurisdiction, as separate subject-matter, distinct from private international law. See Dr. Schoch on *Klagbarkeit*, 1934, pp. 52, 53, and in the opposite sense Neuner, *Privatrecht und Prozessrecht*, 1925.

¹ Chapter xvii, Procedure, pp. 529-58, including such matters as the mode in which an action must (or may) be brought, the determination of the party to be sued, the measure of damages, jurisdiction to stay an action, priorities, and evidence.

contends, should not be labelled "Conflict of Laws".¹ If we might hope for a salutary influence of our legal terms on the minds of our legislators and on the willingness of governments to unify their rules of jurisdiction, in order to avoid clashes between conflicting judgments based on the application of different laws on the facts of the same case in the courts of different countries, we should certainly not like to stand in the way of such a prospect because of a terminological difference of opinion; "private international law" would be a welcome watchword with which to fight for international justice if we believed in its ability to lead us to victory. Unhappily there is no evidence of any progress in the right direction since the time when the expression conflict of laws began to give way to its modern successor.

In the meantime a return to the older term might undoubtedly help us to overcome some of the terminological difficulties. For the conflict of laws (a potential conflict always, and an actual conflict in too many cases) is the only common designation for private international law in the British sense, *droit international privé, commercial, administratif et de procédure; internationales Privatrecht, Prozessrecht, Handelsrecht, Konkursrecht, Verwaltungsrecht*, and so forth.

5. It is in our view an additional merit of the term that it puts international criminal law, the rules governing jurisdiction on and the punishment of the same act in different countries according to different penal codes, side by side with the other cases of a conflict of laws. The essential features are the same and the aim of law reformers and internationalists should be the same in all these cases; they should try to avoid collision and, where that proves impossible, to mitigate the consequences of the miscarriage of justice which an unsolved conflict of laws must always bring with it. The scandal and perversion of justice resulting from

¹ Dicey (5th ed. p. 529), in his introductory remarks to Book III which he entitles "Choice of Law", speaks in rather strong terms of the distinction between the subject of that book and the question of jurisdiction dealt with in Book II. "The Rules contained in Book III", he says, "have nothing to do with the jurisdiction either of the High Court or of foreign courts." And further "a question as to the choice of law is in itself a totally different thing from a question of jurisdiction". At the most they may look one like the other, but then they are not; the appearance is "delusive". A follower of the continental system might ask why the rules on the choice of law which he calls private international law are not allowed to stand by themselves but have to be sandwiched in between "Jurisdiction" and the matters contained in the appendix (pp. 863-1003), while "Procedure" forms a chapter in the "Choice of Law" though the idea of a choice between different laws seems rather incongruous in cases of a question of procedure.

conflicting judgments about the same act or set of acts perpetrated by the same person or persons, with a condemnation here and an acquittal there, or with a double condemnation for the same crime, strikes the layman perhaps with a stronger force than the parallel phenomenon in the sphere of civil litigation. The ultimate goal of criminal international law is to create one single primary jurisdiction for every criminal act, to let this jurisdiction take exclusive cognizance of the crime with a monopoly in prosecution, to assist it in the exercise of its duties and privileges by arrest and extradition of the accused under due precautions and safeguards, and if extradition proves impossible, to make an eventual prosecution before the courts of the country where the criminal has been apprehended, as closely as possible vicarious to the proceedings such as they would be held in the country of the original jurisdiction. The corresponding aim in other fields of international law with respect to a possible conflict of laws must be to form an international body of rules regulating jurisdiction in civil and commercial matters, both as to the right and the remedy, in such a way that wherever an action is brought, the law governing the substance of the suit is the same and is as far as humanly possible applied in the same way.¹ The function of private international law, as Dr. Cheshire justly observes, is to indicate the area over which a rule of law extends, supposing that each fact, event, capacity or transaction of legal importance is located at a definite spot within one of those areas.² In our school of international law at Hamburg we used to say, as an introduction to the higher exercises in the conflict of laws, that two maps of the world were all that was needed; one on which every possible relationship in law was indicated in the way in which towns and villages are inscribed on a geographical map which does not show political frontiers, and another on which the areas of jurisdiction ("the areas over which rules of law extend") would be shown just as a political map shows the areas of political government in different colours. Then all one had to do was to superimpose one

¹ In a series of comparative treatises on criminal law which was published during the preparatory stage of the German Government's fruitless attempt at Reform of the Criminal Code in 1908, the author of the present article has tried to deal with the subject of the *Räumliche Herrschaftsgebiet des Strafgesetzes* (*Vergleichende Darstellung des deutschen und ausländischen Strafrechts, Allgemeiner Teil*, Band VI, pp. 85-316). In a summary of the contents, pp. 310-16, the axiomatic rule of *Einheit der Anknüpfung*, which Niemeyer had first applied to private international law, is used as a guiding principle to the solution of conflicts of laws in criminal matters.

² Cheshire, *op. cit.*, pp. 1-16.

map over the other and follow the colour indication in order to attribute each town to a state and each right or legal relationship to an area of jurisdiction. Every national body of rules on the solution of the conflict of laws or, as the German expression is, on the *räumliche Geltungsbereich der Gesetze*¹ is in fact to be likened to such a map of the world in so far as it should indicate to the courts of the country and to every plaintiff who intends to apply to those courts, not only whether domestic law applies or not, but which foreign law, if any, applies to a given case. While that undoubtedly is the function of private international law as it exists to-day in every country as a branch of its own law, there is hardly any doubt among modern writers on this subject about an ultimate purpose set to all those different domestic rules of private international law by an authority which is higher than that of the most powerful legislature. The very *raison d'être* of law demands that the rights of the subject shall not only be governed but shall also be protected by law, that is to say, by one law to the exclusion of other different laws of other countries. For while it is quite conceivable that the laws and jurisdictions of some countries should be insensate enough to imitate their sovereigns and to quarrel over their territories and the human beings and things in their lands till the human beings are killed or starved to death and the land is a devastated area, it is not conceivable that a right or a legal relationship should want to be or in fact could be governed and protected by two or more conflicting laws, one of which would say that the right exists and is actionable, the second that the right exists but is not actionable, and the third that the right does not exist at all. That may be government, but it certainly is not protection or guardianship such as the reign of law promises to give.

¹ "The application of laws in space", Beale, *The Conflict of Laws*, p. 1. The French, as we had occasion to remark in the text, though preferring the expression "private international law" in the title of a book to that of "conflict of laws", keep much more closely to the traditional view, that of two conflicting sovereignties: "Le droit international privé est donc pour nous l'ensemble des règles applicables à la solution des conflits qui peuvent surgir entre deux souverainetés à l'occasion de leurs lois privées respectives ou des intérêts privés de leurs nationaux." Weiss's definition in his *Manuel* (p. xxxiv) evidently proceeds from the assumption that there is an intention, on the part of the sovereign, to let his rules of law govern a well-defined number of cases, mainly such as interest his subjects, much more than from the supposition of a given relation in space between rights and the laws which protect and govern them. The objection to the French view is, of course, that the will of the sovereign may (if it surges victoriously from the conflict of wills) be relevant for the definition of the area which is to be governed according to his own, but does not indicate in any way how the rights which do not belong to this area are to be distributed among the areas of other sovereigns.

II. *The order in which questions of qualification should be approached*

6. It is the supreme merit of Dr. Magdalene Schoch's recent book on the subject¹ to have stated the three, or possibly four, distinct types of qualification a court may have to put on the facts of a given case in their correct order, or in other words, to have placed the preliminary qualification—that of substance or procedure, or of right or remedy—before the two other groups of qualifications which M. Bartin had succeeded in delimiting, those of private international law, and those of the substantial law to be applied to the disputed claim, with a law designated by the will of the parties as an eventual substitute. We may hope for an English or French translation of Dr. Schoch's book before long; discussion of the problem on both sides of the Atlantic will have to be carried on mainly in English and in one of the Latin tongues, and a contribution as valuable as that of this writer's chapters on *Klagbarkeit* and *Prozessanspruch* cannot be left to casual use by the decreasing number of those familiar with German law literature. In the meantime a few deductions of our own from the brilliant examination which M. Schoch's book has given to the subject may serve as an account of it *ad interim*.

Qualification occurs first in connexion with the general system of the rules on conflict of law, second in private international law in the narrower sense of the term such as it is used on the Continent, and third and last in municipal law after that law has (possibly with the help of the two former processes of qualification) been found to apply to a case. This order of things is axiomatic. It cannot be reversed by approaching the problem in the wrong order, starting, for instance, from the assumption that a certain municipal law might possibly later on be found to govern the case, and that, in the meantime, one might as well assume that it will be found to do so, or assume straight away that it does govern the case and therefore directs every qualification which it may be necessary to make in connexion with the case.² As long

¹ *Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts. Zugleich ein Beitrag zur Lehre von der Qualifikation*, 1934.

² It seems a plausible thing in some cases to say that one might proceed by, first of all, comparing all the municipal laws which might conceivably apply to the case (say, the law of domicile and the law of nationality of every party, and possibly of every former holder of the disputed right, of the place where the objects are located, of an eventual *lex contractus* erected by the will of the parties, of the *lex loci celebrationis* and the *lex loci solutionis*, not to forget the *lex fori* and all the contingencies of *renvoi*) in

as in a concrete case the conflict of laws has not been solved; as long as all the parties concerned, claimant and defendant, solicitors and counsel on both sides, and the judge have still to discover and finally to decide which of the conflicting municipal laws governs the merits of the case, it would be merely begging the question to say that the law which governs the merits, governs, by this fact, qualification in the conflict of laws also.

7. Our first or primary type of qualification consists in attributing the disputed question, group of relevant facts, or legal relationship to one or another of the categories into which we usually subdivide law for the purposes of teaching and research as well as for the more practical purposes of jurisdiction, competence of criminal and civil courts, and administrative competence (including the whole doctrine of *ultra vires*). It is either public law, with the subdivisions of *droit des gens*, *droit constitutionnel*, and *droit administratif*; or criminal law, with penal law as its smaller step-sister; or civil and commercial law. In each of these categories it is either substantial or procedural law, belonging either to the realm of right or that of remedy, redress, punishment, and pardon.

Nobody, as far as we know, has ever attempted to go over this whole field from the point of view of comparative international law or even of international law as it is in force in an individual country at the present day. Such an attempt in this place would

order to find out whether they do not contain the same rule, including the same qualification of all its elements, or at least rules which lead to the same result in the case before the court. If that was done and the rules were found to agree among themselves, the conflict of laws, it is said, would have been spirited away, and nobody need take any pains about choosing between all these rules. But this argument, in spite of its obvious appeal to "common sense", fails for three reasons. In the first place the rules on conflict of laws are rules of law, and as such quite as binding on servants and subjects of the law as any other rule of law; they are to be obeyed and not to be spirited away. In the second place the whole process of comparing the different municipal laws, a process the difficulty of which is often very considerable, is mere waste of time in every case in which those laws are found to differ from one another. But the decisive objection to the proposed short cut is this, that even if the different laws happen to have the same content, this does not in the least dispense a judge from ascertaining which of the laws he is applying to the case. For one thing, the application of domestic and foreign laws is subject to different rules of procedure, especially with regard to *ex officio* application, evidence of the contents, and, on the Continent, admissibility of appeal; and, furthermore, it may now be regarded as common ground that a foreign rule of law should be constructed, as far as possible, in the same way and with regard to the same precedents as the courts of its own country would construct it. How to observe this rule, which we submit is as sound in law as in logic, without knowing which law among the different laws of similar content one is in the act of applying passes understanding. See, among others, Cheshire, *op. cit.*, pp. 69-71, and, generally, Schoch, *op. cit.*, pp. 20-2, 148-51, 157.

be doomed to failure, if only for want of space. It is possible to say, however, that the categories outlined in the preceding paragraph are necessarily exclusive in their claim for including such and such a disputed question in their domain. The question, in other words, can never be of "mixed" character; it is a question either of public, or of criminal, or of civil legal character. It is either substantial or procedural, not both. Demarcation of frontiers may be difficult,¹ but there is this difference between such a delimitation of jurisdictional areas as we view it here, and a political frontier, such as that between Abyssinia and Italian Somaliland or between Turkey and Iraq, that in the latter case a kind of régime of uncertainty may exist, a neutral zone may be established or the actual frontier may be carried back and forth with the different seasons, while in the former case, that of the delimitation of jurisdictional areas, such uncertainty would mean a denial of justice and the denegation of law itself.

On the other side, primary qualification as to the general character of the disputed right and its allocation to the fields of public, administrative, criminal, private, and commercial law, and in each of these fields to the substance or the remedy, helps us to realize, better than any other process of qualification, how far positive law to-day has still to go till it comes to a serious attempt

¹ A notable instance of such a difficulty is to be found in the attribution of a claim arising out of a so-called "penal law" to the category of criminal law (fine) or civil law (damages) or to a group *sui generis*. *Huntington v. Attrill*, [1893] A.C. 150 (P.C.) illustrates the subject. The Privy Council, on a Canadian appeal, held that a New York statute, which under certain conditions created a personal liability of the directors of a corporation for its debts, was remedial, while the New York courts had qualified the statute as penal. The Privy Council, applying the traditional test, found that the enforcement of the statute does not rest with the State of New York or a *quivis ex populo* acting on behalf of the community, but can be sought for the protection of his own private rights by anybody who has suffered damage; it found, therefore, that the action was one which had no penal character, and that the judgment which had been obtained by the creditor in New York could be enforced in Canada. The findings of the New York court about the penal character, which, in the main, seem to have been the result of an appreciation of the legislators' aims rather than of the character of the single action itself, were disregarded. We think with Dr. Cheshire, on p. 77 of his *Private International Law*, that the Privy Council acted rightly in determining for itself whether the foreign law was penal in character or not, the more so as it is certainly within the province of a court to say (as was done in this case) that the action brought was for a civil remedy in the sense of English law.

"The English court", as Dr. Cheshire says, "must itself determine the nature of the law and must not necessarily adopt the view that is taken by the courts of the foreign country in question." In determining the nature of the law the court uses the tests of qualification which have been developed in distinguishing between penal laws and ordinary civil laws in the municipal law of England, and does not feel bound by the codes of interpretation of American statutes which American courts would observe.

at an international solution of the conflict. The house of law seems almost hopelessly divided against itself in such matters as the attribution of the rules on nationality and domicile, or on claims arising out of social insurance and workmen's compensation, or on taxation, or on such questions as the privileges of the Crown, *habeas corpus*, and the doctrine of *ultra vires* and *excès des pouvoirs*, or on the nature of remedy generally and of specific remedies. The jurisprudence of international courts and mixed tribunals since the War, which often brought the systems of Anglo-Saxon, French, German, Italian, and Latin-American law into the closest contact, shows many instances of the irreconcilable difference in primary qualification which exists even between the civil law countries on the European continent. One of the most conspicuous cases, that of the attribution of compulsory health and old-age insurance (social insurance) in the territories ceded by Germany to France, Belgium, and Poland in pursuance of Articles 77 and 312 of the Treaty of Versailles to the sphere of public administrative law or private insurance law has been fully recorded in Dr. Schoch's edition of the Awards of the Arbitral Tribunal of Interpretation at The Hague.¹

That this state of things is deplorable in the interest of the parties as well as in that of international justice cannot be denied. A quotation from Professor Lewald's admirable summary of the international law of succession in his Hague lectures of 1926 may serve as an instance of the general opinion of teachers and writers on international law on this question though it deals with private international law generally rather than with conflicts of primary qualification.² "Chaque État", he says, "possède aujourd'hui son propre droit international privé, son propre système de solutions des conflits de lois dont les principes sont fort dissemblables. Chaque législateur, en édictant isolément des règles de conflit, donne aux problèmes du conflit de lois les solutions qui lui semblent les meilleures, avec la plus grande indépendance et souvent avec la plus grande insouciance pour celles admises dans les autres législations." The last sentence implies a strong censure on some at least of the legislative bodies and the courts that have enunciated principles and formulated rules of private international law, and

¹ *Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans. Erste Session März 1926, I. Teil: Sozialversicherung in Elsass-Lothringen und Polnisch-Ober-Schlesien, 1927, pp. 58-65, 122-66.*

² H. Lewald, *Questions de Droit International des Successions*, 1926, p. 6. An excellent and very moderate statement of the American view is given by H. F. Goodrich, *Handbook on the Conflict of Laws*, 1927, pp. 8-10.

though we may share the impatience at the lack of international co-ordination in this matter (certainly one who has done such eminent service to the true understanding of international law as Professor Lewald is entitled to be impatient about it), it might be that the way to a solution of the existing discrepancies lies rather in stating them as boldly as possible and in upholding the merits of proved national systems (like, for instance, that of the paramountcy of domicile) than in looking for a compromise through comparative studies. While admiring to the full the excellent work done by means of the inter-Scandinavian conventions on conflict of laws, especially those on Marriage and Divorce¹ on the line of a combination of domicile and nationality, we venture to think that one of the most unhappy accidents in the domain of private international law is the recent fashion of proclaiming a "splendid procession of victory" for the principle of nationality, with domicile carried as a prisoner in chains behind the chariot of triumphant nationality—and that at a time when the cases of double nationality and of stateless individuals disturb the world in growing numbers! For similar reasons we do not think much can be gained by a comparison between the merits of a Statute of Limitations proceeding from the point of view of the unsuitability of superannuated claims, and a rule on *Verjährung* which deals with the extinction of rights through conclusive disuse.² What we need is

¹ *Statens offentliga Utredningar*, 1929: 12, *Iustitiedepartementet. Lagberedningens Förslag angående vissa internationella rättsförhållanden*. And see Schoch, *op. cit.*, pp. 118–20.

² With great respect for Mr. Beckett's lucid exposition of the much-discussed subject in *B.Y.I.L.*, 1934, pp. 67–9, 75–7, his final opinion that "the distinction between the barring of the remedy and the extinction of the right which has been adopted by the English courts for the purposes of classification is, though superficially attractive, in reality false", and, later on, "that the English courts have given too wide an interpretation to the conception of procedure for the purposes of the rule of Private International Law, by adopting an unreal distinction between the right and the remedy", does not carry conviction. The distinction between the barring of the remedy and the extinction of the right is real in the double sense, first of a totally different root and growth of the two kinds of defence against claim (one of which is an *exceptio* arising out of the obligation itself, while the other is a plea in the interest of justice), and secondly of an essentially different structure in regard to the period recognized for limitation and the conditions under which that period is to run. Both Tindal C. J. in *Huber v. Steiner* (2 Bing. N.C. 202) and Roche J. in *Prayon v. Koppel* were in our opinion right in their construction of French and German law, but also in their view that the qualification for purposes of a conflict of laws has to come from the law of the country where the court renders justice to the case. Dr. Schoch, *op. cit.*, pp. 110–21, quite rightly lays special stress on the decision of the Swedish Supreme Court published in *Nytt Juridisk Arkiv*, 1930, p. 692, and the note of Bagge in *Festschrift tillägnad Erik Marks von Würtemberg*, p. 19; they fall in with English, Scottish, and American decisions. So do several decisions of the German Supreme Court and the Hanseatic Court of Appeal quoted by Dr. Schoch,

the clearest possible realization, on the part of each legislature and of each court about to create a precedent, of the distinct character of the rule it lays down.

8. The present state of conflict of laws rules in the different countries (or groups of countries with approximately the same system of solution of conflicts) leaves no doubt about the necessity for primary qualification nor about the law which provides the test for such a qualification to the exclusion of all other laws and doctrines. The *lex fori* must, by sheer force of the facts and circumstances, be the governing law; it is the only law at hand at this stage of the application of law by the court; it depends on the system accepted in this law, and cannot possibly depend on any other system whether classification is needed or not. If in the law of the forum the rules on conflict of laws were the same for every imaginable legal situation or relationship,¹ whether personal status, constitutional right of a citizen, commercial transaction, criminal act, confiscation of property, libel, relation between court, counsel, solicitor and client, extradition, licensing and prohibition, liability for motor-car accidents or copyright in films or anything else, these rules would be applied without any regard to the fact that in another country the rules about a conflict of laws in such matters were entirely and essentially different and distinct from the rules governing a conflict of laws in civil matters. But if there is such difference and distinction, the primary qualification has to be applied according to the municipal law of the country where the decision is sought, again without any regard to the fact that according to the laws of other countries such a qualification might be unnecessary or impossible because there the conflict of laws might be centralized under one set of rules. This has to be done before substantive law can be applied to the case, because it depends on the result of the qualification whether the "proper" substantive law to be applied is to be determined by rules of private international law in the narrower sense of the word,

p. 122, note 3, and in German doctrine among others, F. Kahn, *Abhandlungen*, Vol. I, p. 133, and H. Lewald, n. 98, p. 73 (criticizing the notorious decision of the German Supreme Court *R.G.Z.* 7, p. 21), than whom no greater authorities could be quoted among German writers. -

¹ Thus in the general definition of the conflict of laws in Goodrich's *Handbook*, p. 1, "The Conflict of Law is that part of the law which deals with the extent to which the law of a state operates, and determines whether the rules of one or another state should govern a legal situation". Or J. H. Beale, *Conflict of Laws*: "Whenever a question is raised of applying to a juridical situation the law of one or another country, the question so raised must be settled by the principles of Conflict of Laws." Any law of one or another country, to be applied to any juridical situation.

international administrative or criminal law, or the *lex fori* on remedy and procedure.¹ And may we hope that in regard to primary qualification at least the bogey of *renvoi* will not be raised?

III. *Substance and Procedure*

9. The conclusions we have reached in the preceding paragraphs will hardly be contested. On the contrary, we shall be told that it is quite unnecessary to dwell on them at any length because they are self-evident. That is the usual attitude taken about the reign of the *lex fori* in all matters of procedure. Most writers call it an obvious rule—something which has never been seriously doubted, a rule which the courts follow as a matter of course. That is the usual formula, at least, as long as the rule itself is under discussion. But when it comes to the point where we have to decide what is procedure or remedy and what is, in contradistinction, substance or right, the situation undergoes a total change. Everything becomes doubtful and subject to acrimonious controversy. In doctrine, at least, we have recently been taught that every right which merits that name carries its actionability, the way in which it is to be proved, the admissibility of exceptions and counterclaims, and finally the execution of the judgment given in its favour, in itself, and that therefore the *lex causae* alone governs (or should in theory govern) the whole procedure in every material particular except, perhaps, the time for the hearings of the case (though an opportunity to be heard would seem to be inherent in the right which can enforce itself), the length of the tails on a barrister's wig, and the scales of costs—if the *lex causae* should permit. On the other hand, a pronouncement of such great weight in American law as Professor Beale's *Restatement of Conflict of Laws Rules* takes on the whole the opposite view; one consonant with the decision in *Leroux v. Brown*;² while Dr. Cheshire takes a middle course by

¹ For further arguments in support of this view see Schoch, *op. cit.*, pp. 6-9, 20-2, 87-107, 154-60.

² (1852), 12 C.B. 801; condemned both by Mr. Beckett, *B.Y.I.L.*, 1934, p. 29, and Dr. Cheshire, *op. cit.*, pp. 532-4. But see *Restatement of the Law of Conflict of Laws*, as adopted and promulgated by the American Law Institute at Washington, D.C., May 11, 1934, Ch. 1, § 7, and Ch. 12, § 584. The most authoritative statement about the question in German doctrine, in A. Wach's *Handbuch des deutschen Civilprozessrechts*, Vol. I, pp. 121-9, is almost identical with the views taken by Dr. Beale in the *Restatement* and with the English practice. Compare Goodrich, *Handbook*, pp. 157-87; Ailes, *Michigan Law Review*, Vol. XXXI (1933), p. 474; *Harvard Law Review*, Vol. XLVII (1933), pp. 315 ss.; Cook, *Yale Law Journal*, Vol. XLII (1933), p. 333; McClintock, *University of Pennsylvania Law Review*, Vol. LXXVIII (1930), pp. 933-9, in addition to Lorenzen's articles.

combining the principle of protection of acquired rights with the traditional English views on the confines of the province of procedure. "A rule", he says, "which if applied would prevent the enforcement of a right validly acquired under the proper law of the transaction ought not to be treated as procedural merely on the ground that it affects the remedy, but any rule affecting the remedy which does not prevent the enforcement of such a right though it may hinder its enforcement, may properly be treated as procedural."¹ An argument *in favorem negotii* proposed with the aim of overcoming technical difficulties of procedure must always command respect and sympathy, but a doubt may be permitted about the practicability of the latter part of the rule laid down by Dr. Cheshire to safeguard acquired rights. The court, in order to find out whether the rule of procedure to be applied in accordance with the law of the court merely hinders the enforcement of an acquired right or would prevent it, would have to assume, in our opinion, something which it has no right to assume as long as it is not conclusively shown to be true, and it would further have to prejudge the case on its merits before deciding which is the law governing the case, in order to find out which law governs the case. In order to know whether a rule of procedure would prevent (and not only hinder) the enforcement of a right validly acquired under the proper law of the transaction, the court would evidently have to decide first what the proper law of the transaction (including that part of it which would come under the rule of procedure) really and definitely is, and secondly whether under that law the right had been validly acquired; and then, after this preliminary trial of the case had ended in judgment in favour of the owner of the right, the court would have to try the case once more, both with and without the application of the procedural rule, and would then (and then only) be able to say that if the application of the procedural rule led to a result contrary to the result of the preliminary trial, the rule had to be disregarded and that it could be followed only if the claimant would be able to win his case in spite of the rule. There would be the obvious difficulty of a court having to say, at least implicitly, that a rule of procedure of its own law of procedure is calculated to frustrate substantial rights validly acquired, and that it might be good enough for cases under municipal law, but not for cases governed by foreign law. That, of course, is a travesty of what Dr. Cheshire wants to see done, but our argument shows how difficult any

¹ *Op. cit.*, p. 532.

compromise between the *lex fori* and the *lex causae* is bound to be.

How, then, can a rule which is said to be a universally admitted principle, and which has been affirmed again and again by judicial decisions in every country, be as difficult in its application as the rule on the reign of *lex fori* over the remedy seems to be, except through some misunderstanding about the character of procedure in its relation to the substance of the dispute?

10. A good deal of the obscurity disappears if the question is considered in the way in which Dr. Schoch has taken it up in the masterly chapters on actionability under a system of procedure which places actions for declaratory judgment on a level with those for a *sententia condemnatoria*.¹ As long as for practical purposes the claim of a creditor A against a debtor B in substantive law is the only possible basis for an action by A against B, the right of action and its exercise might be thought to be identical with the right itself. But since procedural law has emerged from such a primitive condition and has developed a variety of forms under which protection against a threatened or actual violation, infringement, or encroachment upon the plaintiff's rights or legal position may be sought before a civil court, and especially since in most systems of civil procedure definite conditions of the admissibility of declaratory actions (*Feststellungsklagen*) and of injunctions against a possible future infringement have been laid down, the character of the relation between right and remedy itself has undergone a remarkable change, especially on the Continent, where the public functions of courts of justice had to be rediscovered at the time of the great law reform of the 'sixties and 'seventies.

That the *lex fori* is sovereign in fixing such conditions is undisputed. It can allow an action for declaratory judgment in cases where an actionable right does not exist² and is not even alleged, at least not on the part of the plaintiff. It can make declaratory action a subsidiary remedy or, as most continental laws at present do, an independent remedy which the plaintiff can use at his own choice. It states, independently of the rules of substantial law, what kind of special interest or need for a judicial declaration (*Rechts-*

¹ *Op. cit.*, pp. 64-89.

² An interesting parallel is to be found in the American *Restatement*, 1934, § 617, providing that "an action can be maintained on a foreign cause of action although, by the law of the state which created the right, it is required that suit shall not be brought outside the state".

schutzinteresse, intérêt né et actuel) has to be shown by the plaintiff in addition to the substantial part of his claim if his action is to be admitted. Above all, the parts of plaintiff and defendant, under this new system of procedure, become entirely dissociated from the parts of creditor and debtor, or owner of a right and pretended owner, which the parties assume in civil law.

Delimitation of substance and procedure is not any more contained or implied in the existence of the right itself. It proceeds from the seat of justice where remedies are dispensed, and *lex fori* qualifies, in its own right, the remedies it allows. It is for the *lex fori* to say whether and under what conditions legal relationships need and may obtain judicial determination.

Or to put it in a nutshell, in the sense of the maxim *de minimis non curat praetor* it is for the *praetor* alone, and not for the *minimum*, to say what is a *minimum* and what is not.¹

IV. Qualification in Private International Law and in Municipal Law

11. For reasons of practical convenience as well as by the application of those same theoretical arguments which were found to be valid in the case of a primary qualification, qualification in connexion with a rule of private international law is likewise to be governed by the law of the court.

The practical reason is this. If qualification were to follow the rules of the *lex causae*,² the decision about the law to be applied must needs be reserved to the final judgment and would, in its reasoning, imply a *ὑστερον πρότερον* in its purest form, the court stating that French law applied to the substance of the case, and that therefore the qualification which led to the conclusion that French law applied, had also to be taken from French law, while, if the qualification had been taken from English law, English law would have been found to apply to the substance of the case—and so on with an infinite number of variations.³ Internationalists

¹ M. Schoch, *op. cit.*, pp. 125–9.

² We will assume, for the sake of the argument of our opponents, that there is only one *lex causae* which governs the whole of the substance of the dispute before the court. If we consider the possibility of several such laws applying to different parts of the *causa* (a well-known phenomenon in private international law), the whole of their argument goes.

³ The fault lies in the assumption of a certain law governing the substance on the ground of an instinctive guess on the part of the judge that it might possibly do so—an assumption he makes quite safely and correctly in 999 out of 1,000 cases in favour of domestic law because only one among a thousand cases contains any element of fact

who accept the doctrine of *renvoi* will not be deterred by such a prospect; they are accustomed to worse things. But even they should agree with us in realizing what the practical result would be. As long as qualification depends on the determination of the *lex causae*, and the determination of the *lex causae* meanwhile depends on qualification, the court and counsel for both parties have to reckon with the possibility of any of the "conflicting" laws being called upon, at the time of the final judgment, to have governed the case from its very beginning. They would, therefore, have to state their claim and the defence to it (with a normally rather small chance of later emendation) in accordance with every one of those laws; the evidence to be taken would have to be directed to the points important under any of those laws, and the content of all the foreign laws which might apply would have to be explained by experts. In a recent case before the Court of Appeal it was discovered that the law which governed the case was Scots law, while in the first instance and during the greater part of the hearing on appeal it had been dealt with under English law, and under the circumstances the Master of the Rolls gave judgment explaining the situation first as it would have appeared according to English law, comparing the result with that to be derived from the application of Scots law. But that is more in the nature of an *exceptio firmat regulam* than of a guidance to regular practice in a case of conflict of laws, and if no harm resulted in that case the parties had the affinity of the two neighbouring laws to thank, and not their own carelessness about the "proper" law. We submit that in order to proceed smoothly and with the least possible chance of friction between the presentation of facts and the application of law it is desirable that the law or laws which the court will apply to the substance of the claim should be ascertained at the earliest possible stage of the hearing.

12. This leads to a second consideration to which we have alluded several times in the course of our argument. An opinion which found support from many authorities on the Continent and lately in England proceeds from the assumption that a rule of law (and still more a statute) on civil matters is not an abstract declaration of what the law-giving authority thinks right, but is rather in the nature of an order addressed to a definite number of persons, or affecting a definite group of objects, during a definite period

leading to the application of foreign law, but which he is not entitled to make in the one case in which a foreign law might apply, that is to say, in the case which is governed by a rule of conflict of laws.

of time. The rule or statute, as it seems to the followers of this school, intends and commands to be applied; it has an inherent will to govern such and such a case, and this will has to be respected by the courts—as a matter of course if it is their own domestic law which commands their respect, and as a matter of international comity if it is a foreign law, provided that reasons of *ordre public* do not forbid its application. This theory works perfectly well as long as the supposed conflict of laws is one between domestic and foreign law, or as long as there is only one foreign rule of law which claims to be competent and the parties submit to it. But it does not work at all if the conflict is between two or more foreign laws. *Renvoi* has been tried to its most absurd consequences in order to overcome this difficulty and make one of the conflicting foreign laws stand out as the preferable one, but so far we have been left to face the ugly truth that, after all, the conception of a definite area of application inherent in every rule of law makes for a conflict of laws but does not solve it, except in so far as the courts would prefer their domestic law to any foreign law however well founded its claim to competence may be. A solution of the conflict between two or more foreign laws (or, to be more explicit, a solution of the conflict between parties pretending each of them to have their case dealt with under another law foreign to the court) can only be found if there is a test the court can apply independently of the conflicting wills or supposed wills of legislatures and the conflicting opinion of parties. That is why we think that the rules of private international law are part of the law of the court, and that the qualifications which may be needed to interpret them are to be taken from the *lex fori*.¹

13. Among the objections Mr. Beckett has raised to M. Bartin's theory there is one which calls for special consideration even in a summary account of the question such as this. This objection to qualification on the basis of the internal law of the forum is that it seems to break down if internal law "has no rule or institution similar to that calling for qualification". Mr. Beckett refers to the well-known differences between the English and continental systems of family law, especially with regard to marriage settlements and the rights of the husband with respect of the wife's property, in order to make the point that it would be impossible for an English judge to determine what, in the sense

¹ See Bartin, *Recueil de l'Académie de droit international*, 1930, Vol. I, pp. 566-8; Arminjon, *Précis de droit international privé*, Vol. I, pp. 133-42; Lewald, *op. cit.*, no. 86, 132; Schoch, *op. cit.*, pp. 154-7; and, *contra*, Beckett, *l.c.*, pp. 53-7.

of French private international law, were *effets du mariage*, and what questions arising out of the *régime des biens*, the former being subject to the national law of the parties while the latter come under the law of the original matrimonial domicile. How, Mr. Beckett asks, is an English judge to determine this on the basis of English internal law which knows no *régime des biens* at all?

The answer to this question from the point of view of English law seems to be that an English judge would not have to determine this either on the basis of English internal law or on the basis of French law, because English law has not as yet fallen a prey to *renvoi*,¹ and it is only *renvoi* which asks the impossible. As long as we are able to rely on a system of rules of private international law in each country indicating to the courts of that country without fail, and without recourse to foreign rules of private international law which law they have to apply to the substance of the case (after having indicated, first, whether the question in dispute is a substantial question in a civil matter), there is no necessity for a qualification incidental to French private international law for an English judge, and vice versa. The qualifications he may have to apply in dealing with private international law are those of English rules on conflict of laws. He has to determine what a marriage in the sense of those rules is, what cohabitation without marriage is, what a monogamous and what a polygamous marriage is,² or what his rule on conflict of laws means by the effects of marriage, separation, and divorce on the property of husband and wife³ as distinct from the effects on their status, capacity, domicile, parental consent to their children's marriages, and similar questions. There can be no insuperable difficulty in finding guidance for all the qualifications needed in internal law.

In a period of rapid technical development, such as the present, cases will frequently occur when the legal character of the construction to be put on a group of facts has to be ascertained for the first time, and such things as the unwarranted use of electrical

¹ *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*, [1901] A.C. 373, does not seem to involve the principle of *renvoi* in its usual sense. Inter-colonial law does not make a good guide to private international law, as it is largely governed by policy, in the Charlesworth case a wise policy, but still policy and not law. *Contra*, Hibbert, *Leading Cases*, pp. 1, 2. For American practice see Goodrich, *Handbook*, pp. 23-5, and Lorenzen in *Yale Law Journal*, Vol. XXVII, p. 509; and, further, *Restatement*, 1934, § 7, a model of concise statement of the case against *renvoi*.

² See, for instance, *Cheshire, l.c.*, pp. 232-5, 241-2.

³ *In re Bankes*, [1902] 2 Ch. 333; *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

power, or a disturbance created by flying, or an institution like the "property in use" of the present Russian system, have to be matched with a rule of law without the help of statutory law or precedent. Classification or qualification will also be needed in many of these cases, although the law of the forum has previously had no rule or institution similar to that calling for classification. What can be done and has been done in such cases where the unknown problem was presented by a new development in time, can be done and will be done in cases where the problem arises from a new phenomenon in space. It does not matter, in other words, whether the institution which is foreign to our present system of law is an institution of our own national future, or of a foreign country at present; the courts will be able to deal with it on the basis of the principles of justice and equity they have learnt to apply in the service of their national law if it is a just and equitable law—and if it is not, the use of foreign qualifications will hardly assist them in their task.

14. Mr. Beckett's argument becomes unanswerable, however, if we presuppose three things. First, that internal law qualifies the disputed question as one of substantial civil law; secondly, that internal private international law qualifies the question as one which is in its substance governed by foreign law; and thirdly, that the possibility of *renvoi* must be considered and, therefore, the rules on conflict of laws in force in the country the law of which governs the case have to be consulted as to whether they concur with the *lex fori* or not: in the former case the court may, by leave of the foreign law, apply its own law; in the latter case, according to the doctrine of *renvoi*, the *lex fori* has to give way to the foreign law. In this case, a qualification needed in the application of the foreign rule on conflict of laws is to be taken from the law and jurisprudence of the country which has formulated and adopted that rule, in the same way as when qualification is needed in the construction of a foreign rule of substantial law.

Even so, qualification may in exceptional cases have to be taken from the *lex patriae* or the *lex rei situs*; the cases turning on classification of property into movable or immovable discussed by Lewald in *Das deutsche internationale Privatrecht* n. 236–9, and by Dr. Schoch, pp. 28, 29, show the same hesitations as those quoted by Dr. Cheshire, pp. 318–22, notably *In re Berchtold*.¹

¹ [1933] 1 Ch. 192; Hibbert's *Leading Cases*, pp. 134–6. And see, as to ships, the note on *Schultz v. Robinson & Niven* (1861) 24 S. 120, in Mackinnon's *Leading Cases in the International Private Law of Scotland*, pp. 73–6.

But the rule, both in the best French doctrine and in English law, is that the "sub-classifications", as Mr. Beckett aptly calls them, must be determined in accordance with the law which, as the result of a primary or main qualification, has been found to govern the substance of the case.

A judgment of the Permanent Court of International Justice which touches that point deserves quotation (Judgment No. 14, *Recueil des Arrêts, Série A*, Nos. 20/21, *Affaire des Emprunts Serbes*, at p. 46), as it somehow seems to have escaped general notice.

"The Court", it says, "having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such a country itself—and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant."

THE RETROACTIVE EFFECT OF THE RECOGNITION OF STATES AND GOVERNMENTS

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SINCE the decision of the English Court of Appeal in *Luther v. Sagor*¹ it has been assumed by many English lawyers that the recognition of a state or government is "retroactive" to the date when it first became established as a state or government. Although this may be true, under the existing doctrine of the English and American courts, for municipal purposes, it is far from clear that such is the position under international law.

The international lawyers who made "recognition" a term of art did a great disservice to international law. By surrounding it with technical emphasis without adequate technical definition they gave it an air of magic, which under modern realistic analysis has proved to be false.² The position has been further obscured by the fact that "recognition" has not been confined in its use to the recognition of states and governments. In a broad generic sense recognition includes any acknowledgment or judgment upon an international legal situation or status made by the executive organ of the state, or by some other organ authorized to bind the state in its foreign relations in such a way as to commit a state definitively to such a judgment. It may be the recognition of a new state, a new government or Head of State, or the recognition of a treaty³ a protectorate,⁴ territorial limits,⁵ a status of

¹ [1921] 3 K.B. 532.

² See, for example, Fraenkel, "The Juristic status of foreign states", *Col. L. R.*, Vol. XXV, p. 544; Baty, "So-called de facto recognition", *Yale L. J.*, Vol. XXXI, p. 469; Hudson, "Recognition and Multipartite treaties", *American Journal of International Law*, Vol. XXIII, p. 126; Hervey, "The Legal effects of Recognition in International Law", Erich, *Académie de Droit International, Recueil des Cours*, Vol. XIII, p. 431; Fiseher Williams, *ibid.*, Vol. XLIV, p. 203; Fischer Williams, "Recognition", *Transactions of the Grotius Society*, Vol. XV, p. 53; Fischer Williams, "Recognition in International law", *H.L.R.*, Vol. XLVII, p. 776; McNair, "Judicial Recognition of States and Governments", *B.Y.I.L.*, Vol. II, p. 57; McNair, "The Stimson Doctrine of Non-recognition", *B.Y.I.L.*, Vol. XIV, p. 65; Jaffe, *Judicial Aspects of Foreign Relations*.

³ Article 117, Treaty of Versailles 1919; Articles 58 and 60, Treaty of Neuilly, 1919; Treaty of Moscow of September 1922, between Turkey and Soviet Russia; Resolution of League Special Assembly, March 11, 1932, printed in *L. of N. Off. J. Special Supplement No. 101*, pp. 87-8.

⁴ By Articles 62 and 63, Treaty of Neuilly 1919, Bulgaria "recognized" the French Protectorate over Morocco, and the British Protectorate over Egypt.

⁵ Article 59, Treaty of Neuilly; Article 26, Treaty of Lausanne, 1923.

belligerency,¹ a diplomatic status,² or an international legal claim generally.³ International law, except in so far as it has been modified by treaty provisions, leaves a state free to judge for itself whether a given state of facts falls within a given international legal category. The rule is that a state, subject to its treaty obligations, is not bound to accept a judgment other than its own upon a question of international law or international status. The importance of recognition in international relations and in national courts arises from this peculiar feature of the international legal order.

In this article discussion is confined to the recognition of states and governments, for it is only in this connexion that any difficulty arises on the point whether recognition is "retroactive". In principle, however, all forms of recognition are the same, in that they constitute a political determination, frequently according to considerations of policy, of questions of mixed international law and fact. But since, in practice, there exists no impartial international authority empowered to evaluate declarations of recognition, such declarations are often treated as "constitutive" or "creative" of the legal situation or status to which they refer. As applied to states or governments recognition is often held to be the act whereby the title to act as a government or as a state is conferred in the sense that the government or state is thus "admitted" to the "Family of Nations".

This obscurity and uncertainty as to the precise legal nature of recognition accounts for the illogical body of doctrine which has been developed by Anglo-American decisions on the subject of recognition generally. It also accounts for the apparent acceptance in these decisions of the view that recognition is "retroactive", in the sense that all the acts of the recognized state or government since the date of its establishment must be treated as the acts of a competent government or legally subsisting state under international law. It is in this sense that the acts of such a government are said, somewhat loosely, to be "validated"⁴ from the date on which it came into being.

In *Luther v. Sagor*⁵ Bankes L.J. remarked⁶ that counsel had

¹ Examples are given in Oppenheim, *International Law*, Vol. II (4th ed.), p. 154, and in Fauchille, *Traité de droit international* (8th ed.), Vol. I, Part I, s. 200.

² *Engelke v. Musmann*, [1928] 1 K.B. 90; [1928] A.C. 434. *Fenton Textile Association v. Krassin*, [1922] 38 T.L.R. 259.

³ Article 121, Treaty of Neuilly; Articles 20 and 59, Treaty of Lausanne.

⁴ See *Oetjen v. Central Leather Co.* (1918), 246 U.S. at pp. 302-3. Note Scrutton L.J.'s doubt as to this phrase, in *Luther v. Sagor*, [1921] 3 K.B. at p. 557.

⁵ [1921] 3 K.B. 532.

⁶ At pp. 541-3.

been "unable to refer the Court to any English authority on the question of the retroactive effect of recognition",¹ but that he accepted "in principle" the doctrine laid down in *Williams v. Bruffy*,² *Underhill v. Hernandez*,³ and *Oetjen v. Central Leather Co.*⁴ He concludes that "this Court must treat the Soviet Government which the Government of this country has now recognized as the *de facto* Government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal" (p. 543).

The judgments of Warrington and Scrutton L.JJ. proceed on similar grounds. Warrington L.J. remarks:

"Assuming that the acts in question are those of the government subsequently recognized I should have thought that in principle recognition would be retroactive at any rate to such date as our Government accept as that by which the government in question in fact established its authority. It appears from the letter of the Foreign Office dated April 22, 1921, that that date is anterior to any of the events material to the present case" (at p. 549).

He observes, however:

"I express no opinion on the question whether the retroactive effect of recognition is so wide as to cover every act of the recognized government from the commencement of its existence. It is unnecessary to do so in the present case for the reason that our Government clearly treats the Soviet Government as having effectively displaced the previous Government at a date anterior to the earliest of the relevant events" (at p. 551).

Similarly Scrutton L.J. says:

"In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the *de facto* Government and a statement that in 1917 the Soviet authorities expelled the previous Government recognized by His Majesty. It appears to me that this binds us to recognize the decree of 1918 by a department of the Soviet Republic and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree as acts of a sovereign state" (at p. 556).

He concludes:

"This view renders it unnecessary for me to express a final opinion whether and to what extent a recognition of a *de facto* government is retrospective to previous acts and times. It may well be a question when first the struggling body attained such power that it was a government *de facto* and over what area, and that you cannot answer that question by knowing that some years later the Sovereign recognized it as the government *de facto* over a particular area. When that

¹ Hervey suggests that the early case of *Wright v. Nutt* (1788), 1 H.B. L. 137, "implies that the recognition of 1783 was retrospective in effect". But it is impossible to read this view into the case.

² (1877), 96 U.S. 176.

³ (1897), 168 U.S. 250.

⁴ (1918), 246 U.S. 297.

question is to be answered, the Courts must ask the Sovereign for information; but here the Foreign Office letters appear to show that, since the beginning of 1918, the Soviet Republic has been the Government *de facto* of Russia" (at p. 557).

The effect of the judgments of these two learned judges appears to be that they are unwilling, in the case before them, to lay down retroactivity as a rule of general application; recognition was held to be retroactive in *Luther v. Sagor* because the executive had indicated that it was meant to be retroactive. This cautious attitude and the refusal of the Foreign Office to express any opinion on the question how far the recognition of the Soviet Government was retroactive gave Roche J. great difficulty in the case of *White, Child & Beney, Ltd. v. Simmons*.¹ It fell to the court in this case to determine whether the Bolsheviki were the *de facto* government of Russia (or of parts of it material for the purposes of the judgment) in December 1917, so as to cause its acts to be included in an exception clause in an insurance policy excluding "confiscation or destruction by the government of the country in which the property is situated". Roche J. held there was no evidence to show that the Bolsheviki were recognized as having been the government of Russia at that time, and that a claim in respect of losses resulting from their acts was maintainable. The Court of Appeal, reversing his judgment, held that the facts revealed in *Luther v. Sagor*, and in the instant case impelled the court to the conclusion "that there was at that time (December 1917) in existence a government exercising full executive authority", and that the government then in existence was the same government in fact, as that which the British Government had recognized, with the result that the loss was not covered by the policy. It is difficult not to see in this case an unstated assumption that recognition is retroactive to the date when the government could be said to have been "established". It is an excessively cautious interpretation of this case, and of *Luther v. Sagor*, to say that the court was acting merely on the information supplied by the executive. It is indeed an impossible one, for the Foreign Office in its letter to Roche J. in *White, Child & Beney Ltd. v. Simmons* expressly repudiated the responsibility of deciding whether the Bolsheviki were a "government" in December 1917, and who was Sovereign at that date.² Furthermore, in a letter dated June 10, 1921, the Foreign Office said it was "unable to express any opinion as to how far this recognition is retroactive and to what extent it renders valid the decrees of the Soviet

¹ [1922] 38 T.L.R. 367, 616.

² At p. 373.

Government, these being questions for the decision of the Courts".¹ The retroactivity of recognition is thus regarded as being a legal question which it is for the courts to determine. The result of the decisions in *Luther v. Sagor* and *White, Child & Beney Ltd. v. Simmons* is to accept it as a rule for the cases before the court, though not as an absolute rule. Any doubt as to the doctrine of the Court of Appeal must be removed by the case of *Princess Paley Olga v. Weisz*.² In this case the court openly adopted the rule of retroactivity. The plaintiff was the widow of the Grand Duke Paul of Russia and sued the defendants for the recovery of certain goods or their value and damages for their detention or conversion. The goods had been seized on the outbreak of the Bolshevik revolution in 1917 by persons whose acts were subsequently adopted by the Soviet Government. They were sold as state property by that government, in April 1928, to the defendant Weisz. Mackinnon J. held that the action failed—not because the original seizure could not be questioned, but because under a decree of the Soviet Republic, dated March 5, 1921, the movable property of citizens fled outside the confines of the Republic was confiscated, and because the goods seized passed to the State under a decree relating to the contents of certain buildings of which the plaintiff's palace was one. The plaintiff appealed. The defendants relied on *Luther v. Sagor*. The Court of Appeal agreed that *Luther v. Sagor* governed the facts of the case and dismissed the appeal. Sankey and Scrutton L.JJ. approved and adopted the doctrine of retroactivity laid down in *Oetjen v. Central Leather Co.*, thus expressly adopting the ground which Mackinnon J. had rejected.³ In 1930, in the case of *A. S. Kolbin & Sons v. William Kinnear & Co.*,⁴ the Second Division of the Scotch Court of Session followed this decision of the English Court of Appeal. In an action brought by a partnership formed under the laws of Czarist Russia the defenders pleaded that the pursuers had no title to sue. They based their plea on two grounds, first, that the partnership had no juridical existence under the laws of Soviet Russia, secondly, that the share in the partnership of Simeon Kolbin, deceased, had vested in the Soviet Government by virtue of a decree, made by that government in May 1918, which abolished inheritance in

¹ At p. 371.

² [1929] 1 K.B. 718; 141 L.T. 207.

³ Scrutton L.J. at pp. 724–5, Sankey L.J. at pp. 728–9. Sankey L.J. notes that "the words 'from the commencement of its existence' were criticized in *A. M. Luther & Co. v. James Sagor & Co.*" but does not attempt to develop the criticism.

⁴ (1930), S.C. 737.

Russia. It was this decree which raised the point which is the subject-matter of this note. The Lord Justice Clerk and the other members of the court held that the decree had not the effect contended for, but the court nevertheless treated the decree as the emanation of a sovereign authority. The Lord Justice Clerk remarked:

“The Soviet Government has been recognized by Great Britain, both *de facto* and *de jure* and the recognition dates back, in accordance with authority, to the foundation of the Republic in 1917 and this decree is therefore entitled to the same respect as a statute of the United Kingdom” (at p. 738).

In 1933, the House of Lords gave the sanction of the highest appellate tribunal to these views, in *Lazard Brothers & Co. v. Banque Industrielle de Moscou, the same v. Midland Bank Ltd.*¹ An English firm commenced in 1930 an action against the Moscow Industrial Bank claiming payment of a large sum of money. It obtained judgment in default of appearance, and then obtained a garnishee order nisi against the Midland Bank attaching money alleged to be due from that bank to the Moscow Industrial Bank. The order was subsequently made absolute. The Midland Bank appealed from the order to the Court of Appeal, where it was discharged. On further appeal to the House of Lords the decision of the Court of Appeal was upheld. It was held by the Court of Appeal and the House of Lords that, on the evidence of certain decrees of nationalization made in 1917 by the Soviet Government, and of Russian lawyers as to the effect of these decrees, the Moscow Industrial Bank had ceased to have any juridical existence under the laws of Russia, that the judgment by default obtained against it by the plaintiff was a nullity, and that consequently no garnishee proceedings could be founded upon it. The House of Lords declined to decide at what point exactly the bank had ceased juridically to exist. It was sufficient for its purpose that, at the time the proceedings were instituted in 1930, it did not exist under Russian law. This would appear to be the *ratio decidendi*, but at p. 297 of the report Lord Wright (whose judgment was concurred in by Lords Blanesburgh, Warrington, and Russell) says:

“The Industrial Bank was a corporation established by an Act of the Czar, but the governing authority in Russia, as recognized by the English Courts, is now and *has been since October 1917* the Soviet State. Soviet law is accordingly the governing law *from the same date* in virtue of the recognition *de facto* in 1921

¹ [1932] 1 K.B. 617; [1933] A.C. 289.

and *de jure* in 1924 by this country of the Soviet State as the sovereign power in Russia. The effect of such recognition is retroactive and dates back to the original establishment of Soviet rule which was in the 1917 October Revolution."

With the possible exception of *Princess Paley Olga v. Weisz* it may be doubted whether the acceptance of the retroactive rule was more than *obiter* in any of these English decisions. It may be that the difficulty of ascertaining the facts about Soviet Russia in 1921 explains the difference between the cautious position and qualified approval of the doctrine of retroactivity shown by the Court of Appeal in *Luther v. Sagor* and its definite acceptance of it eight years later in *Princess Paley Olga v. Weisz*. If this is so, it seems clear that it is, in principle, accepted by English courts. Even before the decision in *Princess Paley Olga v. Weisz* several decisions show that English judges, chary though they might be of committing themselves to an acceptance of the doctrine in general terms, treated decrees of the Soviet Government, made before its recognition by Great Britain, as the acts of a sovereign authority.¹

The leading American case is *Oetjen v. Central Leather Co.*² This case, so frequently quoted in English decisions since *Luther v. Sagor*, involved the title to two large consignments of hides which the plaintiff claimed as assignee of Martinez & Co., a firm engaged in business in Mexico, but which the defendant claimed by purchase from a Texas corporation, which, in its turn, purchased the hides in Mexico from General Villa on January 3, 1914. It was proved that the Villa Government had been recognized by the United States, and it was held therefore, by the Supreme Court of the United States, that the plaintiff's title was unimpeachable. The Court said:

"It is the result of the interpretation by this Court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."³

The same ruling was made by the Supreme Court of New York in

¹ *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; *Employer's Liability Assurance Corporation Ltd. v. Sedgwick Collins & Co. Ltd.*, [1927] A.C. 95; *The Jupiter* (No. 3), [1927] P. 250; *First Russian Insurance Co. v. London and Lancashire Insurance Co.*, [1928] 44 T.L.R. 583; *Perry v. Equitable Life Assurance Society of the United States of America*, [1929] 45 T.L.R. 468.

² (1918), 246 U.S. 297.

³ Citing *Williams v. Bruffy* (1877), 96 U.S. 176; and *Underhill v. Hernandez* (1897), 168 U.S. 250; but neither of these cases is expressly in point.

The State of Yucatan v. Argumedo,¹ where it was held that although the plaintiff government had not been recognized when the suit was instituted, the recognition of the Carranza Government by the United States was retroactive so as to "validate" the acts of a constituent government of the State of Mexico existing under the Carranza régime, including the bringing of the action. In *Molina v. Comision Reguladera*² the revolutionary authorities in Yucatan, Mexico, acting under General Carranza, seized the property of the plaintiff, and this action was ratified by the government in 1916. On August 31, 1917, the Carranza Government was "recognized *de jure*" by the United States. The Supreme Court of New Jersey held that this recognition related back so as to "validate" the seizure, that is to say, so as to enable an American court to treat the seizure as the act of a sovereign authority. The Supreme Court of Louisiana in *Monte Blanco Real Estate Corporation v. Wolvin Line et Al.*³ came to the same conclusion on similar facts, holding that the seizure of coffee said to have been made on December 17, 1914, by the agents of the *de facto* government of Mexico which was recognized by the United States on August 31, 1917, was immune from inquiry in an American court. The Texas Court of Civil Appeals in *Terrazas v. Holmes*⁴ applied the principle to a case before them involving similar acts of the Carranza Government.

The doctrine laid down in these cases is not peculiarly Anglo-American. It was, for instance, stated and accepted in express terms, in 1922, by the Commercial Tribunal of Antwerp⁵ and, in 1928, by the Civil Tribunal of the Seine.⁶ But it has gained peculiar importance in the United States and in Great Britain owing to the increasingly rigid view taken in the courts of these countries of their judicial incompetence to regard any government unrecognized by their own government as having any legal status at all.

A distinction may clearly be drawn between (1) the status of an unrecognized government in a municipal court and the power of a municipal court to deal with situations arising out of the *de facto* existence of the unrecognized government, and (2) the status of an unrecognized government under international law. It has been

¹ (1915), 92 Misc. Rep. 547.

² (1918), 103 Atl. 397.

³ (1920), 85 Southern 242.

⁴ (1920), 225 S.W. 848.

⁵ *West Russian Steamship Co. v. Captain Sucksdorff*, *Annual Digest 1919-1922*, Case No. 103.

⁶ *De Mayenne v. Joutel*, *Annual Digest 1927-1928*, Case No. 44. But compare *Basil and Alexander Bessel v. Cools* (1930), *Clunet*, p. 681.

thought by some English and American courts that a judgment by the court upon the first point commits the court to a decision upon the second. They have been afraid that if they admitted an unrecognized plaintiff government or allowed its existence to be proved otherwise than by a statement by the executive they would in some way be "recognizing" it.¹ It is true, that if a court arrived at a decision affirming the existence of a government on independent evidence it would be, in effect, making a decision on the second point—it would be deciding whether the unrecognized government was competent *de facto*. But this would not be recognition in the international sense, and it is wrong in such a connexion, to speak of the danger of a state "speaking with two voices". For the purposes of recognition, in international law a state has only one voice which can bind it internationally—that of the executive. Recognition *implies* a willingness to have diplomatic relations with the government recognized. A court of law could not indicate such willingness in such a way as *to bind a state internationally*.

Anglo-American courts and some continental tribunals² have acted as if there were some magic in the word "recognition". Internationally, and for the purposes of an international tribunal, recognition appears to be purely evidentiary of the contemporary situation, in so far as it constitutes a pronouncement upon a legal status.³ But in Anglo-American doctrine "recognition" is not merely evidence which the court is at liberty to examine on its merits. It is a pronouncement by the executive upon a legal status and upon a state of facts, comparable in its final and binding character to a declaration of war. In the absence of any such pro-

¹ In *Yrissari v. Clement* (1825), 3 Bing. 431, the Court of King's Bench allowed such evidence to be produced. In *The Charkieh* (1873), L.R. 4 Adm. & Eccl. 59, Sir Robert Phillimore attempted to give an independent judicial answer on the question of the international status of the Khedive of Egypt. His attitude was condemned and rejected in *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149; *Luther v. Sagor*, [1921] 3 K.B. 532; *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; and *Musmann v. Engelke*, [1928] A.C. 434. Nevertheless the questions of status raised in these cases were all capable of decision by a court of law. And see Bushe-Fox, "Unrecognized States, Cases in the Admiralty and Common Law Courts, 1805-26", *B.Y.I.L.*, Vol. XIII, p. 39, and in *ibid.* Vol. XII at pp. 74-5.

² Thus certain Belgian courts have held that the Soviet Government not being "recognized" by Belgium, the only Russian law of which they can take notice is pre-Soviet. *Annual Digest 1927-1928*, Case No. 45, *Annual Digest 1925-1926*, Case No. 20, *U.S.S.R. v. Despa*, [1931] *Pas. Belge* II, 108. Similar decisions appear to have been reached by French Courts before 1924, when France recognized the Soviet Government. *Clunet*, [1924] pp. 5-27; *Clunet*, [1925] p. 319.

³ *The Tinoco Arbitration. American Journal of International Law*, Vol. XVIII, p. 147.

nouncement the court cannot take judicial notice of the existence of an unrecognized government. It is probably on this general ground and not for the special reason that governments sue in foreign municipal courts only by virtue of comity¹ that an unrecognized government has no standing in an American or an English court. But no fiction can be consistently maintained, and American courts have been obliged to modify this attitude so far as to take "notice" of the factual existence of an unrecognized government and its acts.²

There is no reason for extending this confused and artificial body of doctrine into the field of public international law. There is no instance in the practice of states or in international jurisprudence of recognition being definitely accepted as retroactive. The affair of *Andrew Allen* which arose in 1799, before the Anglo-American Mixed Claims Commission, set up under the Jay Treaty, raised the question, with somewhat bitter results, for the dispute which it caused was soon followed by the break-up of the Commission. In the memorial presented on behalf of Allen as a British creditor, it was alleged that he was from his birth, and ever had been, a British subject, and that on March 6, 1778, the Pennsylvania Legislature passed a law which attainted him and other persons for high treason, and confiscated his property. Various persons then paid the debts which they owed him to the State. The American agent argued that Allen was an American citizen attainted of high treason and that he did not come within the treaty, on the ground that the United States became independent in 1776. The British maintained that Allen was a natural-born British subject, and being found on the side of his native allegiance at the time of the peace treaty, was entitled to appear before the board as a British claimant. The British Commissioners proposed a resolution to this effect, in which the fifth commissioner concurred, which concluded with the following words:

"That all general argument on the declaration of independence and the effect of acts done under it whether by the Law of Nations, or by virtue of the alleged retrospect of the above recognition by the treaty of peace is therefore precluded."

The American Commissioners withdrew to prevent a vote on this resolution. The difference of opinion was irreconcilable. The

¹ As suggested in *Russian Socialist Federated Republic v. Cibrario*, [1923] N.Y. 255.

² *Russian Reinsurance Co. v. Stoddard*, [1925] 240 N.Y. 149, *Salimoff v. Standard Oil Co.*, [1933] 262 N.Y. 220, Cf. *Annual Digest 1927-1928*, Cases No. 39 and 46. As to the difference in attitude after recognition see *Vladikaukazsky Ry. Co. v. New York Trust Co.*, [1934] 189 N.E. 456, decided by the New York Court of Appeals after the "recognition" of the Soviet Government by the United States.

Americans dated their independence from the Declaration of July 4, 1776. The British held that the United States was, from the Revolution to the treaty of peace, in a state of rebellion towards Great Britain. In the resolution which they proposed, it was declared that "by the treaty of peace of 1783, His Britannic Majesty on the 3rd of September 1783 acknowledged the United States (*not to have been from the 4th day of July 1776 but*) *to be free, sovereign, and independent states*". A lengthy correspondence ensued and the tribunal never reached any decision.¹ In the *Case concerning certain German interests in Upper Silesia*, before the Permanent Court of International Justice, Germany argued that Poland could not claim any benefit from the Armistice signed by Germany with the Allied Powers on November 11, 1918, and that there could not have been any intention of conferring upon her the right to invoke the convention. In the Polish Counter-Case, among other arguments, it was urged that "according to the well recognized rule of international law the recognition of a new state is purely declaratory and is therefore retroactive in effect".² The German Government in its reply dismisses the point summarily, and it is not dealt with as a serious argument.³ Equally inconclusive is the case of *The Macedonian*, which arose in 1863, before The United States-Chile Commission, constituted under an arbitration convention of November 10, 1858. One of the points in this affair was whether the *Rule of 1756* applied to the international relations of the United States and Chile as part of the law of neutrality before 1821, the date when the United States recognized Chile as an independent state. The sentence of the arbitrator, the King of the Belgians, proceeds on other grounds, but the doctrinal note in Lapradelle-Politis expresses the opinion that independence is entirely a question of fact as to which recognition is merely evidence.⁴ This conclusion is supported by the decision of the Arbitrator in the *Tinoco Arbitration*, between Great Britain and Costa Rica in 1923.⁵ As to the argument by the Costa Rican Government in this case, that the Tinoco Government was not a *de facto* or *de jure* Government according to international law, because it had not been recognized by several leading Powers, the arbitrator said:

"But it is urged that many leading Powers refused to recognize the Tinoco

¹ Moore, *International Adjudications*, Vol. III, pp. 238-52.

² *Judgment No. 7, Series C, No. 11*, Vol. II, p. 623.

³ *Ibid.*, p. 821.

⁴ Lapradelle-Politis, *Recueil des arbitrages internationaux*, Vol. II, p. 196, pp. 215-17.

⁵ *American Journal of International Law*, Vol. XVIII, p. 147.

Government and that recognition by other nations is the chief and best evidence of the birth, existence, and continuity of succession of government. Undoubtedly recognition by other Powers is an important *evidential factor* in establishing proof of the existence of a government in the society of nations" (at p. 152).

Then as to non-recognition by the United States:

"The non-recognition by other nations of a government claiming to be a national personality is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. . . . Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government according to the standard set by international law" (at p. 154).

Many of the problems concerning the legal effects of recognition are caused by the confusion between recognition properly so called and the establishment of diplomatic relations. The latter always implies recognition; but recognition is not always accompanied or immediately followed by the establishment of diplomatic relations. There are therefore two main forms of recognition as seen in the practice of states. First, there is the formal declaration of recognition which a government may make without immediately establishing diplomatic relations. Secondly, recognition may be implied from the mere fact of establishing diplomatic relations, for such relations could not exist save on the assumption that both of the parties are competent governments under international law.¹ In both of these cases recognition involves two consequences:

- (1) A final acknowledgment that the government or state recognized is entitled to respect as a competent government or duly constituted state under international law.

¹ An examination of the acts whereby the states of the world "recognized" the Soviet Government of Russia illustrates both forms. The following states made formal declarations of recognition. Great Britain (*de facto*, March 16, 1921, *League of Nations Treaty Series*, Vol. IV, and *de jure*, in a Note of February 1, 1924, quoted in the *Survey of International Affairs*, 1924, p. 491), France (October 29, 1924, in a Note, *Le Temps*, October 30, 1924), Norway (February 15, 1924, in a Note, *The Times*, February 16, 1924), Sweden (March 15, 1924, in a Note, *Le Temps*, March 24, 1924), Denmark (June 18, 1924, in a Note, *League of Nations Treaty Series*, Vol. XXVII). But certain other states made no express reference to recognition but simply opened diplomatic relations with the Soviet Government or made treaties "establishing" normal diplomatic relations. This was done by Germany (Treaty of Rapallo, April 16, 1922, *League of Nations Treaty Series*, Vol. XIX), Japan (Treaty of Peking, January 20, 1925, *League of Nations Treaty Series*, Vol. XXXIV), Austria (Note of February 25, 1924, inviting the establishment of diplomatic relations, *Russian Information and Review*, March 8, 1924), Italy (Treaty of Commerce and Navigation, February 7, 1924, establishing "normal diplomatic and consular relations" and by which "the power of each of the Contracting States is mutually recognized as the sole legal and sovereign power of such state", *Board of*

- (2) The establishment of "comity" between the government recognized and the recognizing government. As applied to the recognition of states this element in recognition has been stated in the form of a legal doctrine of "admission" to the "Family of Nations" and to the benefit of "its" comity and "its" law. The legal validity of this doctrine—the "creative" theory—has been seriously questioned of recent years. The admission of a government to the benefits of international comity is probably not a legal consequence of recognition at all, but it is certainly one result of it in practice. A state or government cannot expect international comity or courtesies from a government which has not recognized it.

It is obvious that most forms of recognition include both of these elements. Where there is a formal declaration of recognition the legal aspect of recognition becomes significant and evident. Where recognition results impliedly from the establishment of diplomatic relations lawyers and publicists have been apt to attach greater importance to the establishment of diplomatic relations than to the legal acknowledgment or recognition implied in it. In other words, seeing that recognition frequently took this form, they have been apt to regard it as an admission to the society ruled by international law, and to see in it an act creative of legal personality or legal title to act as a competent government. The establishment of diplomatic relations may in a sense "create" a new legal relationship, but the establishment of diplomatic relations and recognition are distinct in law. As already stated, recognition in itself is purely declaratory and purely evidentiary.

Conclusions

(1) Recognition is evidence of the existence of a state or government.

(2) English and American courts regard recognition as the *only*

Trade Journal, April 3, 1924), Persia (Treaty of Moscow, February 26, 1921, containing a repudiation of the concessions given by Persia to Russian capitalists but not mentioning recognition or diplomatic relations specifically, *L'Europe Nouvelle*, May 28, 1921), Afghanistan (Treaty of February 28, 1921, recording, by Article I, a recognition of mutual independence and the opening of diplomatic relations, *L'Europe Nouvelle*, May 28, 1921), China (Agreement of May 31, 1924, setting up diplomatic relations, *League of Nations Treaty Series*, Vol. XXXVII). The exchange of notes between President Roosevelt and M. Litvinoff in October and November 1933, speaks merely of sending diplomatic agents (*Documents on International Affairs*, 1933, p. 462).

evidence they are able to accept of the existence of a state or government when they require its existence to be proved.

(3) These courts have developed a legal rule that recognition is *prima facie* retroactive to the date of the establishment of a state or government recognized.

(4) This rule is the result rather of considerations of policy than of juridical logic.¹ The practical justification for it is rightly taken to be that, when a body of men has been recognized as a government by the government of the state where the courts are sitting, it is as impolitic and as contrary to international comity to question what they did, within their international competence, before recognition, as to question what they did, within the same competence, after it.

(5) Recognition is evidence under international law as under municipal law but it is not conclusive. In so far as it is declaratory, that is to say in so far as it is the acknowledgment of an international status, the declaration may, from the international standpoint, be examined for what it is worth. If stated expressly by the recognizing government to be retroactive this gives recognition an aspect different only in degree from an ordinary declaration of recognition and does not affect its essential legal nature. In any event there is no rule of positive international law that recognition is retroactive.

¹ This point is emphasized by Spiropoulos, *Die de facto Regierung im Völkerrecht* (1928), pp. 164-8. Noel-Henry argues that the rule is the result of a declaratory theory of the nature of recognition, and describes the American and English decisions as resting on an "abus de raisonnement". He, however, regards recognition, so far as a municipal court is concerned, as "attributive" of legal personality and as therefore laying down a "règle de droit" which, on general principles, cannot be retroactive in the absence of express stipulation. Noel-Henry, *Les Gouvernements de fait devant le juge* (1927), pp. 174-9.

THE INDEPENDENCE GRANTED TO AGENTS OF THE INTERNATIONAL COMMUNITY IN THEIR RELATIONS WITH NATIONAL PUBLIC AUTHORITIES

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I

“ . . . Aucune organisation internationale ne pouvait réussir si son caractère international devait céder devant une pression nationale quelconque.”

IN these words, Mr. Edward J. Phelan, Assistant Director of the International Labour Office, speaking at a memorial ceremony held two years after the death of the first Director, M. Albert Thomas, referred, in peculiarly striking terms, to a problem we propose to consider here in its legal aspect, namely, the independence of the agents of the international community in relation to national public authorities, as one of the conditions which must be fulfilled if the powers of that community are to be exercised through its own agents.

The international community exercises its powers more and more frequently through political, administrative, or judicial bodies, such as the League of Nations, the International Labour Organization, the Permanent Court of International Justice, and such of the international river Commissions as serve a general interest. All these bodies have constitutions and agents of their own, but their activities can only be effective if, by reason more especially of the diplomatic status or similar protection conceded to their agents, they are made independent of the control of national authorities. The object of this article is to show that this need has repeatedly found expression in spite of the opposition of individual national interests, and to suggest that the principle is sound, despite the fact that it has not always been applied as fully as is desirable.

Governments associated in a matter which, however important, cannot be said to be one of the concerns of the international community may appoint, for the furtherance of their own interests, agents who are frequently invested with diplomatic status by agreement amongst the parties concerned. Our object in mentioning that the powers of truly international agents have their source in those of the international community is to emphasize the fact that we are not here concerned with agents of the latter

type, although they too are in some respects international. For instance, by Article 240 of the Treaty signed at Versailles on June 28, 1919, by the Allied and Associated Powers and Germany, the German Government undertook to grant to members of the Reparation Commission "the same rights and immunities as are enjoyed in Germany by duly accredited diplomatic agents of friendly Powers". This provision was made in the exclusive interest of the victorious states party to the Treaty and was a matter of indifference to other Powers. A measure of this kind is no doubt useful and even necessary for the states directly concerned, but, in such a case, it is not essential to the interests of the international community that diplomatic status should be conferred on the agents of a few Powers, and their agents are not true international agents.

When, on the other hand, the Statute of the Permanent Court of International Justice provides, in Article 19, that "the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities", it formulates a general principle, namely, that, in the interest of the international community, an international tribunal and its members must be independent of the states whose disputes it will have to settle. Similarly, when Article 8 of the Convention instituting the Statute of Navigation of the Elbe,¹ signed at Dresden on February 22, 1922, and brought into force on October 1, 1923, confers on the Secretary-General and the Assistant Secretary-General of the International Commission of the Elbe "the usual diplomatic privileges", it does so in the general interest of the "freedom of navigation", the conservation of which it is the duty of the Commission to supervise, under Article 2 of the Convention and in conformity with Article 332 of the Treaty of Versailles.² The fact that similar terms are employed in regard to the Reparation Commission on the one hand and the Court of Justice or the International Commission of the Elbe on the other does not imply

¹ Manley O. Hudson, *International Legislation, a collection of the texts of Multipartite International Instruments of General Interest*, Vol. II, No. 70, p. 835, Washington, 1931.

² Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol, signed at Versailles, June 28, 1919.

Article 331: The following rivers are declared international: the Elbe (Labe) from its confluence with the Vltava. . . .

Article 332: On the waterways declared to be international in the preceding article, the nationals, property and flags of all Powers shall be treated on a footing of perfect equality, no distinction being made to the detriment of the nationals, property, or flag of any Power between them and the nationals, property, or flag of the riparian State itself or of the most favoured nation. . . .

that the basis of immunity is the same in both cases, or that the legal status of their agents is identical. In the case of the Reparation Commission, the basis of immunity is to be found in the determination of the Allied and Associated Powers to defend, with the greatest possible measure of security and advantage, their special interests within the territory of another Power. In the case of the Permanent Court of International Justice and the International Commission of the Elbe, the basis of immunity lies in the fact that a judge or international administrative agent must be independent of any national public authority whose interests might come into conflict with the international interests entrusted to these bodies. This distinction is of the greatest possible significance to the legal status of a person who enjoys immunity, more especially in his own country. The agent of a state or group of states with particular interests may need protection against the public authorities of the state or states on the territory of which he carries out his duties. An agent of the international community on the other hand may have to exercise his freedom of action in regard to any state which is a member of the community, including the state of which he is a national.

The objects of the large number of international organizations which exist for the purpose of protecting or promoting the interests of the international community present a great variety. But it is believed that the cases in which it has been thought necessary to confer immunities upon the agents of these organizations may be classified in the two following groups: (a) those connected with the preservation of peace, the settlement of disputes and the general social welfare, for instance, the League of Nations, the Permanent Court of International Justice, the International Labour Organization, the International Central American Tribunal¹ and the Central American Commissions of Inquiry;² and (b) the many Commissions connected with freedom of navigation on certain rivers.

The organs of the international community exercise their powers, whatever the extent of these may be, through a great many political, administrative or judicial agents, ranging in importance from the members of the Permanent Court of International Justice, the Secretary-General and secretarial staff of the League of Nations (Article 6 of the Covenant), the Director and staff of the International Labour Office (Articles 8 and 9 of the Constitution of the International Labour Organization), the

¹ Manley O. Hudson, *op. cit.*, Vol. II, 1922-4, p. 908.

² *Ibid.*, p. 985.

Secretaries-General and staffs of river Commissions, to the lowest ranks of administrative employment.

In spite of all the differences between these agents, they have one feature in common:

They are the servants, not of any particular state, but of an organism created by all the states associated in a given task; they are, in the fullest sense of the words, agents of the international community.

II

Positive law contains a great many provisions designed to secure the independence of the agents of the international community in regard to territorial authorities, more especially by extending to such agents the treatment described as "diplomatic privileges and immunities", or similar guarantees. Indeed the problem is by no means new. The past century affords many illustrations of the practice of securing for international agents the measure of independence due to their peculiar situation. For instance, the Final Act of the Congress of Vienna laid down principles for regulating the navigation of rivers which flow through or between several states. The General Treaty of Peace, signed at Paris on March 30, 1856,¹ provided, in Article XV, that those principles should in future apply equally to the Danube and to its mouths. The article adds that the arrangement "*henceforth forms part of the Public Law of Europe*".² Article XVI gave effect to this provision by setting up a Commission on which Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey were each to be represented by one delegate. The Commission was to plan and supervise the execution of any works required to keep the mouths of the Danube and the neighbouring parts of the sea free from sand and other obstructions in order to maintain these waters in the best possible state for navigation. The legal status of the Commission was confirmed in the European Danube Commission's Public Act, signed at Galatz on November 2, 1865,³ regulating navigation at the mouths of the river. Article XXI of the Act reads:

"The works and establishments of all kinds created by the European Danube Commission, or by the authority which shall succeed it, in execution of Article

¹ De Martens, *N.R.G.*, Tome XV, p. 770; Hertslet, Edward, *The Map of Europe by Treaty*, 1875, Vol. II, No. 264, p. 1250.

² The italics are ours.

³ De Martens, *N.R.G.*, Tome XVIII, p. 144; *British and Foreign State Papers*, 1864-1865, Vol. LV, p. 93.

XVI of the Treaty of Paris, particularly the Navigation Cash Office at Sulina, and those which it may hereafter create, shall enjoy the neutrality stipulated for in Article XI of the said Treaty, and shall be, in case of war, equally respected by all the belligerents.

"The benefits of this neutrality shall be extended, with the obligations which spring from it, to the general inspection of the navigation, to the administration of the port of Sulina, to the staff of the Navigation Cash Office and Seamen's Hospital, and lastly, to the technical staff charged with the superintendence of the works."

In this case, the protection required takes the special form of neutralizing the establishments and certain agents of the Commission.

The Treaty, signed at London on March 13, 1871, revising certain stipulations contained in the Treaty of March 30, 1856 (Navigation of the Black Sea and the Danube), extends this protection, in Article VII,¹ to other categories of the Commission's staff:

"All the Works and Establishments of every kind created by the European Commission in execution of the Treaty of Paris of 1856, or of the present Treaty, shall continue to enjoy the same Neutrality which has hitherto protected them, and which shall be equally respected for the future, under all circumstances by the High Contracting Parties. The benefits of the immunities which result therefrom shall extend to the whole administrative and engineering staff of the Commission."

The protection of the Commission's activities was completed when certain of the mouths of the Danube were included, under the Treaty of Berlin,² in Rumanian territory. Article LIII of the Treaty provides that:

"The European Commission of the Danube on which Rumania shall be represented is maintained in its functions, and shall exercise them henceforth as far as Galatz in complete independence of the territorial authorities. All the treaties, arrangements, acts and decisions relating to its rights, privileges, prerogatives, and obligations are confirmed."

The Peace Treaties confirmed the powers of the European Commission, the seat of which is at Galatz. According to the Secretary-General of the Commission,³ "the Rumanian Government has recognized that officials of the Commission should be treated as the staff of a diplomatic mission. . . ."

It is interesting to trace the development which has taken

¹ De Martens, *N.R.G.*, Tome XVIII, p. 303; Hertslet, *op. cit.*, Vol. III, p. 1919.

² De Martens, *N.R.G.*, 2nd Series, Tome III, p. 449; Hertslet, *op. cit.*, Vol. IV, p. 2759.

³ Rey, Francis, Secretary-General of the European Commission of the Danube: "Les Immunités des fonctionnaires internationaux." Extract from the *Revue de droit international privé*, p. 14, Recueil Sirey, Paris, 1928.

place, within three quarters of a century, in the phraseology used to ensure the neutrality of agents acting, as the Treaty of Paris has it, on behalf of the "Public Law of Europe", and the freedom of those agents from interference by territorial authorities. The history of the treatment accorded to the agents of the European Commission illustrates both the problem considered here and a reasonable solution of it. We have, in the first place, *a general interest*, i.e. navigation on a part of the Danube; further, the fact that *agents of the international community are entrusted with the protection of that interest*, the agents being those of the European Commission; and finally, the securing of the *independence of those agents in regard to territorial authorities*. The status of the Commission's agents in their own country remains an open question.

It is no less interesting to note that, as freedom of navigation on the Rhine was gradually instituted,¹ certain guarantees and safeguards were afforded to the bodies responsible for supervising that navigation. This was done by resorting to the conception of neutralizing the persons and things which it was desired to protect, and, although this method has nothing in common with diplomatic privileges and immunities, the underlying object is the same, namely the protection of the independence of the agents of the international community. Thus, when the Convention concluded on August 15, 1804, between France and the German Empire, concerning the Rhine navigation dues, declared the river to be "common to the two Empires" and set up a general customs administration, it also made the following provision in Article CXXXI:

"S'il arrivait (qu'à Dieu ne plaise!) que la guerre vînt à avoir lieu entre quelques-uns des États situés sur le Rhin ou même entre les deux Empires, la perception du droit d'octroi continuera à se faire librement sans qu'il y soit apporté d'obstacles de part ni d'autre.

¹ Convention sur l'octroi de navigation du Rhin, entre la France et l'Allemagne, conclue le 15 août 1804 entre la France et l'Empire germanique; de Martens, *Recueil de principaux traités*, Tome VIII, 1803-18, p. 261. Acte du Congrès de Vienne du 9 juin 1815, articles CVIII et CIX: de Martens, *Nouveau recueil de traités*, Tome II, 1814-15, p. 427; Hertslet, *op. cit.*, Vol. I, p. 208. Règlements pour la libre navigation des rivières, annexés à l'Acte du Congrès de Vienne, articles concernant la navigation du Rhin: article I: de Martens, *ibid.*, p. 436; Hertslet, *op. cit.*, Vol. I, p. 78. Convention entre les gouvernements des États riverains du Rhin et règlement relatif à la navigation du dit fleuve conclue à Mayence le 31 mars 1831: de Martens, *Nouveau recueil de traités*, Tome IX, 1827-31, p. 252; Hertslet, *op. cit.*, Vol. II, p. 848. Convention révisée pour la navigation du Rhin entre la France, la Prusse, les Pays-Bas, la Bavière et les Grands Duchés de Bade et de Hesse, signée à Mannheim le 17 octobre 1868: de Martens, *N.R.G.*; Tome XX, p. 355; Hertslet, *op. cit.*, Vol. III, p. 1847—art. 356 du Traité de Versailles.

"Les embarcations et personnes employées au service de l'octroi *jouiront de tous les privilèges de la neutralité*.¹ Il sera accordé des sauvegardes pour les bureaux et les caisses de l'octroi."

Regulations concerning the navigation of the Rhine were annexed to the Final Act of the Congress of Vienna.² These regulations reasserted that "the navigation of the Rhine along its whole course . . . shall be entirely free", set up a Central Commission whose duty it was "to establish a perfect control over the observance of the general regulation", and confirmed "all the rights of Neutrality" already granted to the staff of the customs houses in the Convention of 1804.

The same wording, in regard to neutrality, is found in Article CVIII of the Convention between the Riverain States of the Rhine, signed at Mainz on March 31, 1831.³ On the other hand, no provision of this kind is contained in the Convention signed by Baden, Bavaria, France, Hesse-Darmstadt, the Netherlands, and Prussia at Mannheim on October 17, 1868,⁴ relating to navigation on the Rhine.

The Central Rhine Commission set up on French territory under the Treaty of Peace between the Allied and Associated Powers and Germany made application to the governments represented on it for the same treatment as they accorded to duly accredited legations. In 1922 the French Government informed the Commission that, in view of the latter's international character "representatives of that Commission and agents travelling on its business would in future be granted the same facilities as they would possess if they enjoyed diplomatic immunities".⁵

These two recent examples, the European Danube Commission and the Central Rhine Commission, above quoted, amount in fact to the grant of diplomatic immunities to certain international agents, and are therefore in accord (though differing in method) with the general tendency already noted of conferring some measure of protection upon international agents. But it is not until the last few decades that we find instances of diplomatic immunities expressly conferred by treaty, in unequivocal terms, upon agents of the international community. Before we consider the period subsequent to the establishment of the League of Nations, we must quote one further example, the Permanent

¹ The italics are ours.

² De Martens, *loc. cit.*; Hertslet, *loc. cit.*

³ De Martens, *loc. cit.*; Hertslet, *loc. cit.*

⁴ De Martens, *loc. cit.*; Hertslet, *loc. cit.*

⁵ This information is supplied by M. Francis Rey, Secretary-General of the European Danube Commission, in the article we have already quoted: *Les Immunités des fonctionnaires internationaux*, Recueil Sirey, Paris, 1928.

Court of Arbitration. The status of the Court is defined in the Convention of October 18, 1907, concerning the Pacific Settlement of International Disputes. Article 46 reproduces the wording established in 1899 and reads as follows:

“Les Membres du Tribunal, dans l'exercice de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques.”¹

The Covenant of the League of Nations deals with the matter in the fourth paragraph of Article 7:

“Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.”

The Statute of the Permanent Court of International Justice defines the position of the Court's members in Article 19:

“The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.”²

The position of the Registry officials is stated in the First Annual Report of the Permanent Court of International Justice:

“As regards officials of the Registry, their status is established by Article 7 of the Covenant of the League which lays down that the ‘officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities’.”

Article 6 of the Convention for the establishment of an International Central American Tribunal,³ signed at Washington on February 7, 1923, reads as follows:

“All members of the permanent list shall enjoy the rank, privileges and immunities of Ministers Plenipotentiary in the Contracting Republics, but only from the date of their designation to membership on the Tribunal established by this Convention and until one month after the termination of the sessions of said Tribunal.”

Article 4 of the Convention for the Establishment of International Commissions of Inquiry, signed at Washington on February 7, 1923,⁴ includes an unusual provision to the effect that Commissioners shall enjoy parliamentary immunities:

“While they may be members of a Commission of Inquiry, the Commissioners shall enjoy the immunities which the laws of the country where the Commission meets may confer on members of the National Congress.”

To these texts should be added those concerning various river

¹ *Second Peace Conference, The Hague, 1907, Actes et documents, Tome I, p. 612.*

² *Permanent Court of International Justice, Annual Reports, 1922-5, pp. 94 et seq., and 103-4; ibid., 1927-8, pp. 53-63; ibid., 1933-4, p. 30.*

³ *Manley O. Hudson, loc. cit.*

⁴ *Ibid.*

commissions such as the International Commission of the Elbe¹ already mentioned, the International Commission of the Danube,² and the Permanent Technical Hydraulic System Commission of the Danube.³

The conclusion to which the texts point is that the independence of agents of the international community in regard to local law is confirmed and given a very wide interpretation by contemporary international law. The practice adopted is to grant diplomatic privileges and immunities, and, in the case of the European Danube Commission's agents, the privilege of neutrality, to those agents who are engaged in the performance of duties involved in the maintenance of peace or in some public international service such as ensuring freedom of navigation on rivers, and to them only. We make this reservation because we are unaware of any treaty stipulation dealing with the independence of the agents of universal unions, such as the Universal Postal Union, the International Telegraphic Union, &c. While these agents are not in any way representative of the international community, they are none the less in its service, and it could be said of them, as early as 1892, that:

"Les bureaux internationaux sont des organes officiels, administratifs ou scientifiques, dont l'originalité consiste à ne travailler pour le compte d'aucun État particulier, mais à les servir tous, tous ceux du moins qui ont signé les conventions en vertu desquelles ils existent. Les fonctionnaires qu'on y rencontre ne sont pas à la solde d'une seule nation, mais émanent simultanément à tous les budgets: ce sont des fonctionnaires internationaux dans toute la force du terme."⁴

III

But the method of granting diplomatic privileges and immunities to international agents does not solve the whole problem to

¹ Cf. *supra*, p. 57, note 1.

² Article 37, paragraph 1 of the Convention of Paris, dated July 23, 1921, instituting the definitive Statute of the Danube, lays down that: "The property of the International Commission and the person of the Commissioners are entitled to the privileges and immunities which are accorded in peace and war to accredited diplomatic agents." Manley O. Hudson, *op. cit.*, Vol. I, p. 681.

³ The Convention approving the Regulations of the Permanent Technical Hydraulic System Commission of the Danube, signed at Paris, May 27, 1923, provides in Article 19 of the attached Regulations relating to the attributions and functions of the Commission that: "The President, the Delegates and their assistants, the members and staff of the Secretariat and of the delegations shall, when exercising their functions, be treated respectively, in each State, as the Head, the members and the staff of an accredited diplomatic mission."

⁴ G. Moynier, *Les Bureaux internationaux des unions universelles*, Geneva and Paris, 1892, p. 6.

which the necessity of protecting their independence gives rise; for they need protection not only against foreign states but against their own states, and many states refuse to confer diplomatic privileges and immunities upon their own nationals. The purpose of diplomatic privileges and immunities is to ensure that the representative of one state shall be able to carry out, in all security, his mission on the territory of another state. Present diplomatic practice effects this object by applying the notion of extra-territoriality. The position of the agents of the international community is quite different. As we have shown, they are not the agents of any one state. They are the agents of a community whose higher interests they represent. They do not always exercise their functions on the territory of a single foreign country. They exercise those functions in regard to several states, sometimes including their own.

The provisions made for organizing and developing the customs administration of the Rhine, the inspectorate and the Central Rhine Commission afford some evidence of the evolution which has taken place in the idea of a function exercised independently of national public authorities. We have already drawn attention to the "neutrality" clauses which the Convention of 1804, the Regulations of 1815, and the Convention of 1831 contain in favour of the customs agents. We might also mention the peculiar status of the judicial authorities set up in connexion with the customs offices by Article 8 of the Regulations of 1815 concerning Navigation on the Rhine:¹

"The judicial authorities—as laid down by the Regulation—shall be maintained at the expense of that State of the Rhine in which they are situated and shall pronounce sentence in the name of their Sovereigns; *but the individuals who compose them shall make oath strictly to observe the Regulation. . .*"²

Finally, the Mannheim Convention provides that, although they are appointed by the riparian states, the inspectors shall take an oath to comply with the Convention relative to the Navigation on the Rhine and that they shall carry out their duties under instructions from the Central Commission. These provisions, however, only very imperfectly defined the position of international agents.

On the other hand, the differences between agents of the international community and national agents were to be expressed very forcibly as soon as the League of Nations was set up and its Secretariat established at Geneva.

"The Members of the Secretariat", according to the Secretary-

¹ De Martens, *loc. cit.*; Hertslet, *loc. cit.*

² Italics are ours.

General, "act, during their period of office, in an international capacity, and are not in any way representatives of their own country."¹

Dealing with the same question, that is, the independence of agents of the international community, the Director of the International Labour Office made a similar statement in his report to the 8th Session of the International Labour Conference,² when he drew the conclusion that their independence should never give way before a national public authority:

"The Office and its officials are required to defend common international interests which may sometimes be contrary to the policy or opinion of a particular country. In all cases it is necessary that the action of the Office and its officials should be free from all pressure on the part of an individual state. This is the real meaning of the diplomatic immunities granted to the Office and its officials. It will therefore be seen that there are three points about the immunities: (1) they belong not to the individual but to the office which he fills; (2) they are a right and not a favour; (3) they are granted without distinction of nationality."

Since then the independence of the League's agents has been defined in an Assembly Resolution. On October 17, 1932, the 13th Assembly decided, on the proposal of Mr. de Madariaga, Spanish representative, that the Secretary-General and all the higher officials should in future make the following declaration before the Council at a public meeting:³

"I solemnly undertake to exercise in all loyalty, discretion and conscience the functions that have been entrusted to me as (Secretary-General) of the League of Nations, to discharge my functions and to regulate my conduct with the interests of the League alone in view, and not to seek or to receive instructions from any Government or other authority external, (*for the Secretary-General:*) to the League of Nations, (*for the other officials:*) to the Secretariat of the League of Nations."

The Director and officials of the International Labour Office are required to make, in similar terms, a declaration of loyalty to the International Labour Organization.

No agents of the international community could be more typical than those of the League of Nations and of the International Labour Organization and it would be difficult to express more clearly than in the undertakings reproduced above the independence they must enjoy in regard to national authorities.

¹ *League of Nations, Records of the 1st Assembly, Meetings of the Committees*, Vol. II, 4th Committee, Annex II, p. 87.

² *International Labour Conference, 8th Session, Geneva 1926. Report of the Director*, p. 51, § 25.

³ *L.N.O.J., Special Supplement*, No. 103, November 1932. *Resolutions and Recommendations adopted by the Assembly at the Thirteenth Ordinary Session*, p. 17.

When expressed in this form, however, their independence raises two problems, and the same solution may not be appropriate to both:

- (a) What is the position of an agent of the international community in the territory of a foreign state in which he may be residing for the purpose of exercising his functions?
- (b) What is his position in his own country?

IV

The diplomatic privileges and immunities conferred on agents of the international community by the various instruments we have mentioned make sufficient provision for the independence, in the country of residence, of such agents as are not nationals of that country.

The seat of the League of Nations and of the International Labour Office being at Geneva, it became necessary to conclude, in 1921 and 1926¹ respectively, two agreements with the Swiss Federal Government. Under these agreements, the staff of the League of Nations and of the International Labour Office is to be accorded "the same prerogatives and immunities as are conferred by International Law and practice on the staff of diplomatic missions".²

The diplomatic privileges and immunities which, in view of the Statute of the Court, the Dutch Government accords to members of the Court are the same as those which they grant in general to heads of missions accredited to H.M. the Queen of the Netherlands.³ The Registrar is assimilated to members of the Court.⁴ The higher officials of the Court enjoy "the same position as regards diplomatic privileges and immunities as diplomatic officials attached to legations at The Hague".⁵

Under Article 11 of the Organic Statute approved by the Council of the League at its 32nd session (Rome, December 1924),⁶ some at least of the staff of the International Institute for Intellectual Co-operation enjoy the status granted to officials of the League under Article 7, § 4, of the Covenant. Many similar

¹ *L.N.O.J.*, 7th Year, No. 4, April 1926, p. 517; No. 10, October 1926, p. 1407 and p. 1422.

² *L.N.*, Communications from the Swiss Federal Council concerning the Diplomatic Immunities to be accorded to the Staff of the League of Nations and the International Labour Office. C. 66, 1926, V.

³ *Permanent Court of International Justice*, 4th Annual Report, p. 57.

⁴ *Ibid.*, p. 58

⁵ *Ibid.*

⁶ *L.N.O.J.*, 6th Year, No. 2, February 1925, pp. 285 *et seq.*

instances could be supplied without adding anything of substance to what has been said above.

There is no occasion for restricting the extent of the independence conferred upon agents of the international community by Article 7, § 4, of the Covenant and by similar provisions. The draftsmen of the Covenant, and those who negotiated the agreements and statutes mentioned above, did useful work when they emphasized the tendency to recognize the independence of the agents of the international community by granting them immunities such as guarantee, at any rate to foreigners, a considerable measure of independence. The regulation of the position of the agents of that community in regard to their own country is not so satisfactory.

V

It will be observed that two of the provisions to which we have just referred contain reservations as regards agents who are nationals of the country in which they reside.

Article IX of the 1926 agreement¹ concerning the diplomatic immunities accorded to the staff of the League and of the International Labour Office in Geneva reads:

"In the case of members of the staff of Swiss nationality, the following exceptions are instituted:

1. Officials of Swiss nationality may not be sued before the local courts in respect of acts performed by them *in their official capacity and within the limits of their official duties*.²
2. The salaries paid to them by the League of Nations are exempt from cantonal and municipal direct taxes."

A similar provision is made in the Regulations concerning the immunities of the members and of the Registrar of the Court:³

"The Members and the Registrar of the Court—of Dutch nationality—shall not be answerable before the local courts for acts which they perform in their official capacity and within the limits of their functions. The salaries accorded them from the Court's budget are exempt from direct taxation."

The Regulations contain a similar clause concerning the higher officials of the Registry.

No mention is made, in these provisions, of diplomatic immunities proper in favour of agents who are nationals of the country of residence. Reservations similar to those just quoted have been made in regard to the status of agents of the river Commissions

¹ Cf. *supra*, p. 67.

² Italics are ours.

³ *Permanent Court of International Justice, 4th Annual Report*, p. 60.

who are nationals of the country of residence.¹ Inasmuch as these reservations were made by the Dutch and Swiss Governments, it is improbable that they are based on any objection in principle to the independence of the agents of the international community. But the reservations illustrate the reluctance of certain governments to recognize diplomatic privileges and immunities, particularly the privilege of extra-territoriality, in favour of their own nationals. They also express the real difficulties of the problem.²

Indeed, whatever one may think of the notion of extra-territoriality, one must admit that the position of a national who is the diplomatic representative of a foreign state on the territory of his own country is ambiguous, particularly in regard to immunity from jurisdiction. If there is no waiver of immunity and if the local jurisdiction does not apply, what jurisdiction will apply? It is quite reasonable that states should reserve their right to examine each case of this kind on its own merits, and Satow's is the most logical conclusion.³ Are agents of the international community in the same position?

VI

Whether the principle of extra-territoriality be taken as the basis of the whole system of diplomatic immunities or be given the restricted interpretation recommended in the Draft Regulations on Immunities adopted by the Institute of International Law at its Cambridge Session in 1895,⁴ that principle has for many years provided matter for lively discussion.⁵ It is unnecessary for us to take part in this debate, the more so since the expression "extra-territoriality" does not appear in the Draft Regulations on Immunities adopted by the Institute at its New York Session.⁶

¹ Rey, Francis, *Les Immunités des fonctionnaires internationaux*, pp. 12 *et seq.*

² See more especially the replies of the governments to the questionnaire drawn up, in regard to diplomatic privileges and immunities, by the Committee of Experts on Progressive Codification of International Law, appointed by the Council of the League of Nations: *League of Nations, Committee of Experts on Progressive Codification of International Law. Report to the Council of the League of Nations on the questions which appear ripe for international regulation*, Geneva, 1927.

³ Satow, Sir Ernest, *A Guide to Diplomatic Practice*, 3rd ed. revised by H. Ritchie, London, 1932, § 239, p. 129.

⁴ *Annuaire de l'Institut de droit international*, Vol. XIV, 1895-6, p. 241.

⁵ See especially *League of Nations, Committee of Experts on Progressive Codification of International Law. Report to the Council of the League on the questions which appear ripe for international regulation*, Geneva, 1927, p. 78, Report of the Sub-Committee on diplomatic privileges and immunities, statement by M. Diéna.

⁶ *Annuaire de l'Institut de droit international*, New York session, 1929, Vol. XXXV, Tome I, p. 463, Tome II, pp. 207 *et seq.*, p. 309. Art. 9 of the New York Draft Regulations

Yet we think it would be difficult to find at the present time a more appropriate means of expressing the independence of a diplomatic agent in regard to local law and his subjection to the law of his own country "*en tant que c'est le domicile qui régit les lois et les juridictions*" (Cambridge Draft Regulations, Article 7).

The question as to what law shall apply to a diplomatic agent is not settled by the purely negative fact of his immunity. The problem is a positive one and it must be solved by a positive formula. Legislation in regard to the acquisition of nationality in the country of diplomatic residence cannot affect a diplomatic agent; but his nationality and that of his children continue to be governed by the legislation of his country of origin. Similarly the fiscal legislation of the country of residence is not applicable to such an agent, but he remains subject to the fiscal legislation of his country of origin, whether this legislation exempts or taxes or ignores him.

This first problem, raised by the application of diplomatic privileges and immunities to nationals, whether they be representatives of a foreign state or of the international community, is a comparatively simple one. That such nationals should temporarily be exempted from local jurisdiction is not inconceivable, as we shall show. That they should be "extra-territorial" is more difficult to imagine, and a sound agreement in regard to the immunities of agents of the international community ought to confine "extra-territoriality" proper to foreigners. What the international community is entitled to ask for in favour of its agents who are nationals of the country of their residence is that certain effects of the law should, in the interests of the international community, be suspended for the duration of the agents' functions. This, however, does not amount to a privilege of extra-territoriality.

VII

In regard to third parties, especially creditors, the allied question of immunity from jurisdiction is no less important, and the subjection of a diplomatic agent to the tribunals of his own country is a necessary complement to his immunity from local jurisdiction. For if the latter is not competent, it is essential that some other jurisdiction should be. This condition is fulfilled as

is as follows: "*Le chef de mission, les membres de la mission officiellement reconnus comme tels et les membres de leurs familles vivant sous le même toit ne perdent pas leur domicile antérieur.*"

regards diplomatic agents. But when the country of origin coincides with that of residence, as happens in the case of nationals who enjoy privileges and immunities, a paradoxical situation arises in which one and the same tribunal is incompetent owing to the diplomatic status of the agent, but competent in view of his nationality. If the tribunal be considered incompetent the result may, in theory, be a denial of justice, while if it be considered competent nothing will be left of the immunity. The fact of granting immunity from jurisdiction to residents in the country of which they are nationals creates a class of persons who, while their functions last, come under the jurisdiction of that country's tribunals only if a certain condition be fulfilled, namely, that their immunity be waived. No other jurisdiction is competent in regard to such persons.

In the case of agents of the international community, however, no other solution than the grant of immunity makes it possible to assure the independence of their international position. It is extremely difficult to find any justification for the immunity of such an agent from the jurisdiction of the courts of the foreign country in which he resides which does not apply in exactly the same manner to the courts of the country of which the agent in question is a national. It would be preposterous that an agent of the international community of French nationality, say, for instance, an official of the League of Nations resident at Geneva, should be protected by immunity from the jurisdiction of the Swiss courts throughout the territory of the whole Confederation, but would be deprived of this protection by passing the French frontier ten miles from the seat of the League of Nations. If the superior interest of the international community makes it essential that such an agent should be exempted from the jurisdiction of the Swiss courts unless and until his immunities have been waived by the Secretary-General of the League,¹ the same interest requires that he should enjoy similar exemption before the courts of his country of origin. This indeed is the view which has been adopted, though not without some hesitation, by the Institute of International Law

¹ *L.N.O.J.* Communications from the Swiss Federal Council concerning the Diplomatic Immunities to be accorded to the Staff of the League of Nations and of the International Labour Office, *loc. cit.*, Article VII: "Subject to the provisions of Article IX below, officials of the organizations of the League of Nations at Geneva who are members of the staff of the first category or extra-territorial staff shall enjoy immunity from civil and criminal jurisdiction in Switzerland, unless such immunity is waived by a decision of the Secretary-General or of the Director of the International Labour Office."

at its Vienna session.¹ The right to waive immunities, vested in the authority which appoints the agent in question, is a sufficient guarantee that cases of denial of justice will not occur.

However, no doubt because they are nervous about the theoretical implications of such a solution, the states which are most interested, namely, Switzerland and Holland, decline to grant their own nationals who are agents of the League of Nations more than a limited immunity from jurisdiction. They base this immunity on the notion of the agent's irresponsibility for acts performed by him in his official capacity and within the limits of his official duties.²

VIII

In the last few years, there has been heated argument about the position of agents of the international community, and particularly of League officials, in the territory of their own country. The draft scheme for the establishment of the Permanent Court, presented to the Council of the League of Nations by the Advisory Committee of Jurists entrusted with its preparation and returned with amendments by the Council to the Assembly, contained an Article 19 dealing with the diplomatic privileges of the Court's members. The article read as follows:³

"The members of the Court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives."

The draft scheme as a whole was referred by the Assembly to the Third Committee and by the latter to a sub-committee, where the British delegation proposed an amendment to the effect that the words "outside their own country" should be suppressed in Article 19. Sir Cecil Hurst, representing the British Empire, said:

"The British Government did not think it reasonable that a judge belonging to the country in which the Court had its seat should not enjoy diplomatic privileges. He observed that the same question arose concerning the permanent

¹ Cf. *infra*, pp. 73-5.

² *L.N.O.J.* Communications from the Swiss Federal Council concerning the Diplomatic Immunities to be accorded to the Staff of the League of Nations and of the International Labour Office, *loc. cit.*, Article IX, *Permanent Court of International Justice*, 4th Annual Report, p. 60, A—II, § 3.

³ *L.N.*, 1st Assembly, *Records, Meetings of the Committees*, 3rd Committee, Draft Scheme for the establishment of the Permanent Court of International Justice, presented by the Advisory Committee of Jurists, Annex I, p. 412. Draft Scheme as amended by the Council and submitted to the Assembly, Annex I, pp. 483 and 486. Amendments proposed by the British Delegation, Annex 25, p. 592. Discussion of Article 19 by the sub-committee of the Third Committee, p. 356. Report submitted to the Third Committee on behalf of the sub-committee, Annex 7, pp. 526 and 529. Draft report to the Committee by M. Hagerup, chairman of the sub-committee, Annex 33, p. 604. Adoption of Article 19 by the Third Committee, p. 305.

Secretariat of the League, and expressed the opinion that the time had come to abandon the old diplomatic rule, according to which a person enjoys diplomatic privileges only outside his own country."

The opposite view was defended by M. Max Huber, representative of Switzerland, and since then President of the Permanent Court of International Justice.

"M. Huber, in opposition to Sir Cecil Hurst, moved that the original text be maintained. The extension of diplomatic privileges would lead to inadmissible results which the Swiss Government were not prepared to accept as concerns the permanent Secretariat. Persons enjoying, for instance, the right of voting in Switzerland could not be exempted from the application not merely of criminal legislation, but also of rules concerning taxes and military service. Steps would, of course, be taken to protect their professional secrets, but a clear distinction must be drawn between their situation as officers of the League and their personal legal status."

Finally the sub-committee adopted the text which appears in the Statute of the Court.¹

In the report presented to the Third Committee on behalf of the sub-committee, Article 19 was followed by the following commentary:

"The Sub-Committee has given this Article a wording corresponding to that of Article 7 of the Covenant, where the question of the immunities of officials of the League is dealt with.

"The Sub-Committee was of opinion that the question of the situation of judges in their own countries should not be prejudiced by the solution adopted."

The conflicting views defended at Geneva by Sir Cecil Hurst on the one hand and by M. Max Huber on the other were again to clash at the session of the Institute of International Law² held at Vienna in 1924. After having attempted in a final resolution to define the expression "officials of the League of Nations", the Institute's rapporteurs submitted for approval by the meeting a second resolution worded as follows:

"In applying the treatment for which provision has been made above—diplomatic immunities in favour of the officials covered by Article 7, paragraph 4, of the Covenant—the Members of the League shall not be entitled to draw any distinction between their own nationals and those of other States."

Recalling the general interest attached to the functions with which officials of the League of Nations are entrusted, the rapporteurs justified their proposal in the following terms:

"According to the majority of the sub-committee, it follows logically that persons entrusted with a mission by the League of Nations in the territory of their

¹ See above, p. 57.

² *Annuaire de l'Institut de droit international*, Vol. XXXI, Session of Vienna, pp. 1 et seq., 115 et seq., 179.

own country could not be refused diplomatic privileges and immunities by that country if it were a State Member of the League. It is true that international practice usually allows States the right of refusing to receive one of their nationals as the representative of a foreign Government, but the only reason for that practice is that States very naturally object to their nationals entering the diplomatic service of a foreign Government. This obviously does not apply to the League's officials who carry out their duties in the collective interest of all States. Moreover, the issue here is not the refusal to receive a representative, but whether or not a person who is authorized to carry out a mission of the League in his own country should enjoy diplomatic privileges and immunities there. To-day the right of a national to diplomatic immunities, once he has been received as the representative of a foreign State, has obtained fairly wide recognition."

The Committee's proposal was ably defended by M. Politis and M. Henri Rolin. It was on the other hand attacked by M. de Lapradelle with the support of M. André Mercier. M. de Lapradelle held that the principle laid down by the Committee was inadmissible. It would give "officials" of the League of Nations a more favourable status than the general law allows a person who represents a foreign Power in his own country, for such a person would not be entitled to immunities. If the principle laid down by the Committee were accepted, no law would henceforth apply to the agents in question, no tribunal would have jurisdiction over them, and the consequence would be a denial of justice. M. Henri Rolin "admitted that the Covenant had broken away from certain traditional ideas. But when they accepted Article 7 of the Covenant, Members of the League of Nations undertook to grant officials engaged on the League's business every diplomatic privilege and immunity. Were an exception, based on the nationality of any such official, allowed, it would restrict, in an unjustifiable degree, the meaning of Article 7, though that meaning was quite clear enough." M. Politis "saw in this very interesting debate a conflict between two radically different views. One of these, the view of traditional diplomacy, had been brilliantly argued by M. de Lapradelle. The other, confirmed in Article 7, was the view of the future. It followed from the quite recent notion of international duty. Now, if the League of Nations was to live, that idea of international duty must be protected, and made to penetrate the legal conscience of mankind."

Finally, Article 2 below was adopted by the Institute together with Article 4, which moderates its effect:

Article 2.

"Dans l'application du traitement prévu ci-dessus, les membres de la Société des Nations ne sont autorisés à faire aucune distinction entre leurs ressortissants

et ceux des autres États. Il est désirable toutefois que les agents de la Société ne soient appelés à exercer leurs fonctions dans leur propre pays qu'en cas de nécessité absolue et avec l'agrément continu de leur gouvernement."

Article 4.

"Au cas où les agents de la Société des Nations seraient assignés ou poursuivis devant une juridiction quelconque, l'autorité compétente pour procéder à leur nomination aura qualité pour se prononcer sur la levée de l'immunité."

IX

The fact that we have here adopted an opinion similar to that expressed by the Institute of International Law ought not to conceal from us the technical difficulties which we have pointed out as being inherent in the application of diplomatic privileges and immunities to nationals. Nor ought it to leave us in ignorance of the fact that diplomatic immunities may not always be attended by all the conditions which are essential to ensure the independence of an agent of the international community, in the fulfilment of his mission. As we have shown, agents of the international community represent a general interest, which may be distinct from that of certain states and particularly of the agent's own state. To be effective, the immunity of the international community's agent must protect him even in regard to the authorities of his own country.

Do diplomatic privileges and immunities, in which, as applied in practice by the Chancelleries, the notion of extra-territoriality plays a large part, always provide the most appropriate means of ensuring that agents of the international community shall be able to carry out their duties with the independence called for more especially in the Assembly Resolution dated October 17, 1932? We have in view two particular instances:

- (a) the military duties of the international community's agents;
- (b) the passports of those agents.

(a) *Military duties* are of a very rigorous kind. More often than not they are binding even on persons resident outside the territory of their own country. Moreover, they can hardly be reconciled with the duties entrusted to agents of the international community. It is difficult to conceive that, in the event of a war, members of the League Secretariat would in one form or another be obliged to discharge national military duties. If this were to be so, what would be the position, one might also ask, of Secretariat officials, bound to the League by their oath, but nationals of a state or states which had been declared by a majority of the states

members to have broken the Covenant? In such cases, the duties laid upon an agent of the international community would be in violent opposition to his duties as a national.

Would the problem be solved if agents of the international community were to receive from their own government a grant of diplomatic immunity? It is clear that although such a step would represent an advance it would not afford a complete solution. The relation between diplomatic immunities and exemption of nationals from military duties is very uncertain, and it is to be feared that serious difficulties might arise, particularly in time of war and in the event of drastic war-time legislation. The real solution, then, would probably be to treat the exemption of the international community's agents from military duties as an essential condition of their independence. Positive law is not very helpful in this respect. We have already mentioned the provisions made in the Treaty of London, dated March 13, 1871, for the neutrality of all the works and establishments initiated by the European Danube Commission and the extension of corresponding immunities to the whole of the Commission's administrative and engineering staff.¹ We have also mentioned a few early clauses neutralizing the agents of the Rhine Navigation Customs.

Article XI of the agreement concluded in 1926 between the Secretary-General of the League of Nations, the Director of the International Labour Office and the Swiss Federal Government provides as follows.²

"If the exigencies of training and the interests of the country permit, exemptions from or postponements of military service shall be granted to officials of Swiss nationality incorporated in the Federal Army in cases in which their compliance with an order calling them up for military service would be likely seriously to interfere with the normal working of the services of the League."

In all probability, however, the Swiss Government would claim the right to appreciate the "exigencies of the training" and the "interests of the country", so that in serious cases the provision would lead to controversy.

(b) *Passports* also play their part in making an agent of the international community dependent upon his own country, and it is open to question whether the necessity of holding a national passport is strictly compatible with the independence which such

¹ During the Great War, however, these neutrality provisions were ineffective.

² *L.N.O.J.* Communications from the Swiss Federal Council concerning the Diplomatic Immunities to be accorded to the Staff of the League of Nations and of the International Labour Office, *loc. cit.*

agents should have in their movements. Clearly, the fact that an agent of the international community has to ask his government for a passport enables that government to limit his independence to some extent. In this connexion, we may be permitted to regret the refusal of the Assembly of the League of Nations to support the proposal made by the Conference on Passports, Customs Formalities, and Through Tickets, to the effect that the Secretary-General of the League of Nations "should be empowered by the Members of the League to grant to the members of the Secretariat and agents of the League passports of a special type".¹ "These passports", the Conference proposal went on to say, "would be valid without visa in the territories of all the Members of the League."

The Assembly² of the League of Nations did not see fit to entertain these views, and in a Resolution adopted on September 15, 1920, left it to members of the League to supply the latter's officials with the necessary documents and visas. One cannot help thinking that under this procedure there is always a risk of the League's agent being unable to fulfil his mission.

To sum up, we have shown that the contemporary law of nations tends to protect the independence of the international community's agents against any control by national authorities. We have also shown that the result of conferring diplomatic privileges and immunities on many of these agents is to strengthen such independence considerably in regard to states of which the agent is not a national. On the other hand, the problem of the independence of the agents of the international community in regard to their own countries has not been completely solved. This failure is due as much to technical reasons arising out of the nature and purpose of diplomatic privileges and immunities as to the

¹ *L.N., Record of the First Assembly. Meeting of the Committees*, Vol. I, p. 215.

² *Ibid.*, 2nd Committee, pp. 121, 125, 127, 136, 160, 242: "The Secretary-General of the League of Nations shall deliver to members of the Secretariat and officials of the League an identity card certifying the identity of the holder and the nature of his official duties. On presentation of this card and at the request of the Secretary-General, the Government of which the holder is a national, shall deliver or cause to be delivered by any of its diplomatic representatives or by its consular agent at Geneva, a diplomatic passport permitting the official to carry out the mission with which he is entrusted with the benefit of all privileges and immunities provided for in Article 7 of the Covenant, and valid for the duration of such mission in the limits indicated by the Secretary-General:

"Diplomatic visas will be given gratuitously—whenever necessary—on the request of the Secretary-General of the League of Nations by the diplomatic or consular agents of the Powers in whose territory the official will be travelling in accomplishment of his mission."

reluctance some states feel about exempting their nationals from the ordinary rules relating to such matters as national defence and passports. Here the interests of the international community come into conflict with national interests or traditions. This conflict will not be settled until there is a full realization of the fact that the problem is not so much that of granting all traditional diplomatic immunities to agents of the international community with respect to their state of origin as of determining the most suitable means of ensuring their complete independence of any form of national control. It may be hoped that, as regards the immunities essential to the free discharge of the duties entrusted to the agents of the international community, it will prove possible to reconcile two principles which are at first sight in fundamental contradiction with each other, the principle of the national allegiance of these agents and the principle of granting to them these immunities, even in their relations with the state of which they are nationals.

THE RELATION BETWEEN MEMBERSHIP OF THE LEAGUE OF NATIONS AND MEMBERSHIP OF THE INTERNATIONAL LABOUR ORGANIZATION

By C. W. JENKS

THE legal relation between membership of the League of Nations and membership of the International Labour Organization is a topic which many international lawyers have never had occasion to consider, and an attempt to state briefly what has now become the accepted position may not be without interest to them. The governing text is Article I of the Constitution of the International Labour Organization (Article 387 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace), which provides that:

"2. The original members of the League of Nations shall be the original members of this organization, and hereafter membership of the League of Nations shall carry with it membership of the said organization."

Two questions have been mooted at different times in connexion with this article, that of whether membership of the Organization is not restricted by it to members of the League, and that of whether it is effective to impose membership of the Organization on states which are admitted to the League by a vote of the Assembly but do not formally ratify the Constitution of the Organization.

Much of the discussion of the first problem has turned upon the applicability of the *expressio unius exclusio alterius* rule, and upon the interpretation to be placed upon the *travaux préparatoires* of the Constitution. Of the first, it is perhaps sufficient to say with Hall that "there is no place for the refinements of the courts in the rough jurisprudence of nations", at any rate in the sense that technical rules of construction ought not to be relied upon to the exclusion of historical and other evidence which points in a contrary direction. As for the historical evidence, recent research¹ has made it clear that during the earlier stages of the preparation of the Constitution of the Organization there was a division of opinion upon the question of identity of membership

¹ See *The Origins of the International Labor Organization*, ed. Shotwell, Vol. I, chapters by E. J. Phelan upon the Commission on International Labour Legislation and the Admission of the Central Powers to the International Labour Organization, pp. 179-82 and 259-78.

between the League and the Organization, and that this division of opinion is responsible for the form of the present text, but that before the Treaty of Versailles came into force the postulate of identity of membership had been discarded by the Supreme Council which recognized that the International Labour Conference would be competent at its First Session to admit Germany and Austria to the Organization. An adequate discussion of the historical evidence would, however, involve a lengthy argument, and for the purposes of this article it may be preferable to rest content with a statement of the broader grounds which can now be pleaded in support of the legality of admission to the International Labour Organization of states which are not members of the League.

There is nothing in the Constitution of the Organization which expressly prohibits such admission, while there is, in the third paragraph of the Preamble which refers to the failure of any nation to adopt humane conditions of labour being an obstacle in the way of other nations which desire to improve the conditions of their own countries, at least an indication that the universality of the Organization is a necessary condition for the proper fulfilment of its functions. Nor is there any ruling by the Permanent Court of International Justice, which has exclusive jurisdiction to interpret the Constitution of the Organization, against the legality of such admission. In the case concerning the possibility of Danzig becoming a member of the Organization, President Anzilotti declared that such admission would be illegal, but he remained in a minority of one, the majority of the Court refusing to express any opinion upon the matter, and ex-President Huber taking the opposite view.¹ In these circumstances it is natural to attach decisive importance to accepted practice. Austria was a member of the Organization for several months in 1920 before she became a member of the League. Germany was a member of the Organization without being a member of the League from 1920 to 1926. Brazil remained a member of the Organization on her withdrawal from the League in 1928. The United States of America accepted membership in the Organization in reply to a unanimous invitation from the International Labour Conference in 1934. Spain notified her intention to retain membership of the Organization when giving, in 1926, the notice of withdrawal from the League which she subsequently withdrew, and Japan has notified her intention to retain membership of the Organization when her

¹ *P.C.I.J.*, Series B, No. 18, pp. 9-10, 19-20, and 30-1.

notice of withdrawal from the League takes effect.¹ All the members of the League have, in one way or another, in their character as members of the Organization, acquiesced in these precedents. Half the delegates to the International Labour Conference (and in practice considerably more than half) are government representatives, and on behalf of their governments voted for the admission of Germany and Austria in 1919, and for the invitation to the United States in 1934. Most of them (those of the eight states of chief industrial importance not being entitled to vote) were also responsible for the election of Brazil to the Governing Body in 1931 and 1934. The members of the League have, therefore, speaking through their representatives in the International Labour Conference, repeatedly approved the membership in the Organization of states not at the time members of the League. On one occasion they came close to endorsing the same view in the Assembly itself. At the First Session of the Assembly, the Fifth Committee proposed for adoption a Resolution implying the power of the International Labour Conference to admit to the Organization certain states the admission of which to the League the Committee was unwilling to recommend.² This resolution was later modified for reasons quite unrelated to the question of the powers of the International Labour Conference; but it is highly significant that it was proposed for adoption by the Fifth Committee, which in 1920 was concerned, not with the social and humanitarian questions which have since become its province, but with the admission of new members to the League. It was therefore the Committee of the Assembly most qualified to express an opinion on the subject.

There may be some who, while prepared to accept the above precedents as decisive simply because they exist, will be inclined to look upon them as an anomaly and indefensible in principle. It would seem a mistake to look upon the precedents in this way. There is no ground of substance for taking objection to the admission to the Organization of states not members of the League. It has been a feature of the policy of the League to encourage the co-operation of such states in all possible spheres. They can, for instance, be admitted to the Transit Organization by resolution of a General Conference of the Organization for Communications

¹ Since the above was written, Japan's notice has taken effect, but she has retained membership of the Organization.

² See *Records of the First Assembly, Meetings of the Committees*, Vol. II, pp. 196-7, 200-1, and 240.

and Transit (Statute of the Organization for Communications and Transit, Article 3 (3).) Some of them may become parties to the Statute of the Permanent Court of International Justice (Protocol of Signature of the Statute of the Permanent Court of International Justice, fourth paragraph). Many of them have been invited to participate in the conferences on disarmament, economic and monetary questions, the codification of international law and the unification of the rules of law upon various matters, drugs and social questions generally, and even to co-operate in varying ways with League Committees appointed to assist the Council and Assembly in the performance of their primary duties under the Covenant itself. In these circumstances the possibility of separate membership of the International Labour Organization should be regarded, not as an anomaly, but as a rule based on sound policy and obvious convenience.

League membership, on the other hand, automatically involves membership of the International Labour Organization. This rule is stated in express terms by Article 1 of the Constitution of the Organization. What, however, of a state admitted to the League by the Assembly, which claims that it has not accepted indefinite stretches of the Treaty of Versailles, but only the Covenant? Can it, in reliance upon such a claim, deny its membership in the International Labour Organization? It is now generally held that it cannot, and that for two reasons. In the first place, Article 23 (a) of the Covenant provides as follows:

“Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

- (a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations.”

The words “the necessary international organizations” cannot refer to anything other than the International Labour Organization, and, taken together with Article 1 of the Constitution of the Organization which appears under varying numbers in all the treaties containing the Covenant, must be considered to have the effect of an incorporation into the Covenant of the obligations resulting from the Constitution of the Organization. This apart, any member now joining the League must take the League as it finds it. It has been a feature of the League’s development that various powers and responsibilities have been conferred upon it

under instruments other than the Covenant. Except in the case of powers and responsibilities conferred upon the League under the treaties which included the Covenant, it has been customary for the appropriate organ of the League, normally the Council, to accept such powers and responsibilities by resolution.¹ Once accepted, however, such powers and responsibilities become a part of League constitutional law and their validity cannot be challenged by any state subsequently admitted to the League. In like manner, certain implications of League membership, notably membership of the International Labour Organization under Article 1 of its Constitution, are notorious features of the accepted constitutional arrangements of the League and it is not open to a new member to question a rule sanctioned by unbroken custom. Twenty-eight members of the League have now acquired membership of the International Labour Organization, without being parties to any of the treaties, in consequence of this combination of texts and customary understandings. Only one such state, Salvador, has contested this, and in the case of Salvador an Assembly Sub-Committee which included among its members Sir Cecil Hurst, now President of the Permanent Court of International Justice, reported that:

“The Treaty of Versailles once in force, and the League of Nations once established, states which were not parties to the Treaty could not accede to the Covenant, could not become members of the League, without becoming members of the League as it was constituted at the moment of their accession, that is to say, bound by the relations and subjected to the obligations specified by the Treaty, and in particular those contained in Part XIII concerning the Labour Organization.

“In the same manner as, in private life, a member who attaches himself to an existing association cannot refuse to recognize obligations of the association which existed before he joined, even if such obligations are not formulated in its statutes, so a state which, without reservations, becomes a member of the League of Nations cannot dispute obligations resting upon the League before the state's accession, and can the less do so in the present case in view of the circumstances that it is a question of obligations under the burden of which the League was born, and that Salvador has by its accession acquired the quality of an original member of the League.”²

Salvador did not insist upon her claim, and the rule may now be considered to have become fixed beyond question. Again, the resulting situation should not be regarded as anomalous. There is every justification for attaching, inseparably to League membership, obligations which can also be undertaken by states not prepared to become members of the League.

¹ See, for instance, for the acceptance by the Council of its responsibilities under the Polish Minorities Treaty, *League of Nations Official Journal*, 1920, First Part, pp. 55-6.

² *Records of the Third Assembly, Minutes of the First Committee*, pp. 101-2.

SOME DEFECTS IN THE ENGLISH RULES OF CONFLICT OF LAWS .

By J. G. FOSTER

It is quite clear that the existence of defects in any branch of law is entirely a matter of opinion, but probably there would be general agreement that this branch of English law does not embody absolute perfection. The difficulty is that the word "defects" necessarily implies a standard by which the defectiveness of any given rule is tested. A proposition of law may be defective because, if tested by principles of abstract justice, it apparently tends to work more injustice than justice; here the terms justice and injustice require careful definition and explanation. Alternatively the matter may be tested by a reference to the laws of other countries. If a great majority of foreign systems of law have adopted a solution of certain legal problems different from that of England, then it may be that this divergence can be termed a defect. Again certain rules may be in themselves illogical or may exist because of certain distinctions which are unnecessary or inconvenient, when judged from the point of view of a clear, logical, and just system.

It is not intended to discuss those defects which may be said to be inherent in English law as a whole, though this will not exclude the consideration of a few defects in the English rules of Conflict of Laws which they share with other branches of the law.

Perhaps the most striking characteristic of English law is its uncertainty; in the Conflict of Laws it is astonishing and deplorable to find that there is no authority on some of the most elementary points. This is due to the English system of obtaining the statement of the law at the expense of the litigant. Points of law which may affect a great section of the population may remain undecided until a litigant, either obstinate or unfortunate, procures a decision on the matter which, if displeasing to the executive, may be reversed by legislation.

It will be apparent from the rest of this article that the rules concerning many important matters in English private international law are doubtful and the subject of contradictory pronouncements by text-book writers.

Domicil

The doctrine of domicil may be perhaps described as one of the basic principles of English private international law. Owing to

the insularity of most of the writers on this subject, domicile is complacently accepted by them as a satisfactory criterion of personal law. The objections to the theory of domicile are founded on the fact that the conception is both artificial and complex. The distinction between a domicile of origin and a domicile of choice and the rules regarding the loss of such domicile are technical and not in accordance with the ordinary facts of life. The term domicile itself is, according to Sir George Jessel,¹ impossible of definition. The difficulty of ascertaining whether a particular person has or has not acquired a domicile of choice is one that has been before the courts on many occasions. As it depends on intention, which, as Cheshire puts it, is a "state of mind which can be ascertained only from a miscellany of *indicia* quite incapable of precise definition",² every conceivable factor can be taken into account in deciding whether a person is domiciled in a particular country, and therefore it is often impossible to advise with any certainty on a question of domicile. The latitude of appreciation by the courts makes their decisions appear arbitrary and inconsistent.

Nor does the doctrine of domicile possess the merit, which is sometimes claimed for it, of providing a definite system of law as the personal law. The doctrine only lays down that the system of law which governs the status of the individual in the country of his domicile will be that applied in the English courts. It is not sufficient to establish in any particular case that a person has a Russian or Indian domicile; it must be next ascertained what law the Russian or the Indian courts would apply to a person of his nationality, if the domicile is Russian, or of his religion, if the domicile is Indian. The best course would seem to be to adopt the doctrine of nationality as applied on the Continent. It is true that there is a movement there in favour of domicile, but this is mainly due to a dislike, on political grounds, of a large foreign community with its own personal law within the boundaries of the state. However, the doctrine of nationality is unlikely to be adopted, and much of the inconvenience and uncertainty caused by the doctrine of domicile would be removed by approximating the English conception of domicile to that adopted on the Continent where domicile means the place with which the person in question has the most real connexion. It is true that in the case of British subjects this criterion would also be open to criticism on the ground of vagueness. In many countries, however, the fact that an individual has

¹ *Doucet v. Geoghegan* (1878), L.R. 9 Ch.D. 441 at p. 456.

² *Private International Law*, p. 91.

his *actes de L'État Civil* recorded in a particular place establishes a connexion with that place. It is submitted that nationality would be an easier method by which to determine the status of a person and that, failing this, the English conception of domicile should be drastically modified.

Even apart from these fundamental criticisms, the theory of domicile is defective in other respects. These defects could be cured without the adoption of any proposals as revolutionary as those set out above. Private international law in England is too uncompromising over the recognition of the system of nationality. For instance, a divorce is only recognized in England if it has been obtained either in the courts of the country in which the husband is domiciled or if the divorce, though obtained in some other country, will be recognized by the law of the country of the husband's domicile. Let us suppose that X, a French national, has a domicile of origin in a country with which he has no connexion, and in which he has never been, e.g. one of the states of the U.S.A. Unless X acquires a domicile of choice according to the rules of English law, this domicile will continue to govern his personal law though he will naturally regard himself as a Frenchman, and though a great majority of the countries in the world would consider his personal law as regulated by French law. If the particular state of the U.S.A. where he has his domicile of origin has the same rules as to domicile as England then a French divorce obtained by him will not be recognized by the English courts unless he acquires a French domicile, since it will have been obtained in a country in which he is not domiciled and which is not recognized in the country of his domicile of origin. The inconvenience and injustice is obvious; by a strict insistence on the doctrine of domicile the English courts are refusing to recognize the existence of a system other than their own. A certain concession to nationality would seem to be necessary. The rule could be more elastic, for instance that personal law is governed by domicile in the case of (a) British subjects, and (b) persons domiciled in the British Dominions. All other persons should have their personal law regulated according to the whole law of their nationality, i.e. either by nationality or domicile as the case might be. An alteration of the law in this respect would not be such an innovation as might be supposed when it is considered that the doctrine of domicile itself as applied in English law is subject to considerable exceptions both unnecessary and illogical.

Among these exceptions it may be mentioned that nationality

has been declared¹ to be a ground for the assumption of jurisdiction by a foreign court sufficient to make a judgment of that court enforceable.² It is quite clear that this rule is anomalous, as the English courts, in spite of the great reliance they place on the doctrine of domicile, refuse to recognize the domicile of the defendant as sufficient to give a foreign court jurisdiction.

Again, it is difficult to see why on principle marriages on the high seas or in uncivilized countries should be tested, as to the validity of the form employed, by the nationality of the parties³ and not by their domicile.

The rule that an infant until he attains majority cannot change his domicile is apparently absolute in English law except in the case of a female infant who marries and acquires the domicile of her husband. An inflexible rule of this kind is clearly inconvenient since it does not correspond with the actualities of life, where it is quite common to find a minor of 18 or 19 who marries and establishes a permanent home in a country other than that of his father. A more convenient rule would seem to be to allow a minor on marriage or emancipation from his home to acquire a domicile of choice.

The subject of domicile also provides a good instance of an important point being left undecided. It would be natural to suppose that the domicile of origin of an infant whose domicile had been changed during minority would have been easily ascertained. As English law attaches so much importance to the conception of domicile, it is clear that this question ought not to be left in doubt. It does not matter much whether the domicile at birth or the domicile at majority is chosen so long as the rule is certain. In *Firebrace v. Firebrace*⁴ Hannen J. clearly regarded the domicile of an infant which had been acquired through the father's change of domicile as a domicile of choice.⁵ The same point of view was taken in a later case where the point had not to be decided.⁶ On the other hand, in *Urquhart & Butterfield* Lopes L.J. stated that the domicile of the infant at majority was the domicile of origin. Here again it was not necessary to decide the point. It is probable that the courts would decide that it is the domicile at birth,⁷ but the cases mentioned above show that the question is still controversial.

¹ *Emmanuel v. Symon*, [1908] 1 K.B. 302; *Philips v. Batho*, [1913] 3 K.B. 25.

² *Gavin Gibson & Co. v. Gibson*, [1913] 3 K.B. 379

³ *Dicey*, Rule 182 (2) (iii).

⁴ (1878), 4 P.D. 63.

⁵ Cf. *Re Duleep Singh* (1890), 7 Mor Bk. Rep. 228.

⁶ *Re Macreight Paxton v. Macreight*, 30 Ch.D. 165.

⁷ 37 C.D. 357.

Marriage

Passing from the question of domicile, the subject of marriage will supply a number of defects in the rules of private international law dealing with that matter.

A glaring instance of insular self-sufficiency seems to be afforded by what is known as the rule in *Sottomayor v. de Barros* (No. 2),¹ which is stated as follows in Dicey:² "The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile does not exist under the law of England." This proposition is an attempt to reconcile the rule that the validity of a marriage requires that each party should have the capacity to marry by the law of the domicile with the actual decision in *Sottomayor v. de Barros* (No. 2).³ In the latter case one of the parties to the marriage was a domiciled Portuguese who was forbidden by the law of her domicile to marry a first cousin, and the marriage was held valid on the ground that he was domiciled in England. It may be that the statement of the law as set out above will not be considered correct if the reasoning urged by Cheshire⁴ is adopted. He points out that the satisfactory rule from the theoretical point of view would be to lay down that capacity must be tested by the law of the matrimonial domicile. In *Sottomayor v. de Barros* (No. 2) the judge did actually choose the matrimonial domicile, though he advanced other reasons for his decision.

The whole question of polygamous marriages is unsatisfactory, especially when it is realized that hundreds of millions of British subjects live under a system of law which permits of polygamous unions. It is impossible to examine the matter here;⁵ it is sufficient to state that the problem is to reconcile the rule that a polygamous marriage is in English law no marriage at all with the due recognition of rights, such as rights of succession and legitimacy, which arise out of the status of husband and wife accorded by the law of a country where polygamy is valid. The conclusions of Beckett in his admirable article⁶ are embodied in a series of propositions which, though excellent in themselves, are not necessarily a correct statement of the present position. On

¹ Cf. the Scotch case of *Cromptons' Judicial Factor*, 1918, S.C. at pp. 386, 390, 391.

² p. 755.

³ 5. P.D. 94.

⁴ Similarly in *Halsbury's Laws of England*, 2nd ed., Vol. VI, p. 286.

⁵ See Cheshire, pp. 291-4.

⁶ See Beckett, *L.Q.R.*, Vol. XLVIII, p. 341.

general principle it is true to state that a polygamous marriage would not be held invalid for all purposes in English law, though of course it could never be the subject of adjudication by an English court exercising matrimonial jurisdiction. How far a polygamous marriage will be held valid in England is a difficult problem. It may be that in some matters the question of status arising out of such a union may be separated from the question of recognizing a polygamous marriage. For instance, it would be quite possible to determine that the issue of such a union is legitimate without recognizing it as a marriage.¹ The truth is that the whole question is obscure; it can be argued that the English law on the subject is fairly satisfactory, but it is impossible to support this by decisive authority. It is greatly to be regretted that so important a matter should be left in doubt in view of its importance in the legal relations of the various parts of the British Empire. At the present moment it cannot be stated authoritatively whether the child born abroad of a British subject who has contracted a polygamous marriage can be a natural-born British subject or not. This depends on whether he is legitimate or not on the principles of English law. Considering the number of cases in which this problem must arise it is remarkable that the law on the matter is not settled.

Closely connected with this topic is the unfortunate effect of the decision of the House of Lords in *Shaw v. Gould*.² Put shortly, this case decided that where an English marriage was dissolved by the courts of a foreign country (Scotland) notwithstanding the English domicile of the parties, and one of them (the wife) thereupon contracted another marriage in that foreign country, the issue of that foreign marriage could not be regarded as legitimate in England. This was in spite of the fact that the children were born in the country (Scotland) where their father was domiciled, and by whose law they were considered legitimate. The connexion between this rule and that of the legitimacy of the children of a polygamous union is obvious. It is desirable in both cases that the legitimacy of the children should be recognized in England if that status was accorded to them by the law of their father's domicile. The doctrine of *Shaw v. Gould* is in itself unjust, since by making legitimacy depend on birth in wedlock, it renders illegitimate the children of any marriage where an invalid divorce has been previously obtained by one of the parents. This would be so even if it were the father who, after having obtained such a

¹ Cheshire, p. 292.

² L.R.I. Eq. 247.

divorce, changed his domicile to that of a country recognizing the divorce and contracted a valid marriage there. The injustice resulting from the decision of *Shaw v. Gould* has driven Cheshire¹ to the desperate expedient of submitting with "considerable confidence" that *Shaw v. Gould*, though a decision of the House of Lords, was wrongly decided and should be disregarded by that body on the ground that it conflicts with other decisions. While the utmost sympathy must be extended to this gallant attempt to overcome this formidable obstacle in the way of a sane jurisprudence, the only possible method would seem to be to reverse the decision by legislative action.

Returning to the rules concerning marriage, there are still one or two major defects which should be mentioned. In the first place the consent to a marriage is classified in English law as a formality. The result is that even where the law of the matrimonial domicile absolutely prohibits a marriage celebrated without certain consents being previously obtained, the English courts will declare such a marriage valid if celebrated in England, on the ground that consent is a matter of form and therefore governed by the *lex loci celebrationis*. This rule can be deduced from dicta in *Ogden v. Ogden*² and from the judgment of Lord Campbell in *Brook v. Brook*.³ It is true, as Beckett argues,⁴ that *Ogden v. Ogden* is now very much discredited, but it is probable that the classification of all consents as a formality is still part of our law. It is equally true that the case of *Salvesen v. The Administrator of Austrian Property*⁵ recognized foreign decrees of nullity even where they are purporting to dissolve for want of form a marriage celebrated in England. The result of this makes it possible for a decree of nullity in the courts of the matrimonial domicile to undo the harm which the English rule as to consents has done. Beckett's conclusion is that a consent whose absence only postpones a marriage is perhaps justifiably classified as form,⁶ and that a consent which is essential to the marriage, as in *Ogden v. Ogden*, would now be held to be a matter of capacity. It is extremely doubtful if this is really so. Consent has been classified for historical reasons as a matter of form and it would seem too late to argue the contrary, however desirable it might be to do so. The practical effect of this classification has been changed by the decision in *Salvesen*, but the theory remains. It would be better to change the classification so that theory and practice agreed.

¹ p. 297.

² [1907] P. 107.

³ 9 H. L.C. at p. 216.

⁴ *B.Y.I.L.*, 1934, p. 80.

⁵ [1927] A.C. 641.

⁶ *Simonin v. Mallac*, 2 Sw. & T. 67.

The second object of criticism in connexion with marriage and divorce is the decision in the case of *R. v. Superintendent Registrar of Marriages for Hammersmith, Ex Parte Mir-An Warredin*.¹ One of the grounds given for the decision was that the English courts will not recognize a foreign divorce which has not been given by any judicial authority. This is a principle which seems to merit being called a defect since it is both illogical and unnecessary. In this case a domiciled Indian had purported to divorce his wife by sending her a written bill of divorcement which was the only way he could legally obtain a divorce. This was the method prescribed by his religious law which, according to the law of his domicile, namely India, was determined to be his personal law. It is difficult to see why the perfectly sound rule that a divorce valid by the *lex domicilii* is valid in England should be subject to the exception that the divorce must have been pronounced judicially. As Cheshire remarks,² the case under consideration conflicts with the decision of the Privy Council in *Sasson v. Sasson*.³ It would also lead to the non-recognition of divorces in such places as Northern Ireland, Quebec and Russia, where divorce is not granted by judicial pronouncement, although the marriages celebrated in these countries are recognized in this country. It would seem absurd to recognize a Russian⁴ or Quebec marriage, but to say that even domiciled inhabitants of these countries could not be divorced legally by the methods recognized in the country of their domicile.

Contract

It is a remarkable fact that the rules as to the formalities of contracts (other than marriage contracts) are not clear. There is disagreement among the writers on the subject as to whether a contract void as to form by the *lex loci contractus* should be held void in England even if the formalities comply with the law governing the interpretation of the contract or with the *lex loci solutionis*. Except for Cheshire⁵ the text-book writers assert that the *lex loci contractus* prevails in the sense that compliance with its formalities is absolutely necessary. If this indeed be the law, then it must be recognized that the rule is illogical and inconvenient. Very often the place of contract is a mere accident; for instance, two Englishmen entering into a contract of sale of a motor-car in London while they are travelling in the Orient Express through Bulgaria. There seems no reason why their contract should

¹ [1917] 1 K.B. 634.

² p. 278.

³ [1924] A.C. 1007.

⁴ *Nachimson v. Nachimson*, [1930] P. 217.

⁵ p. 175.

conform to the requirement of Bulgarian law as to form, and it is to be hoped, in company with Cheshire,¹ that this is not so.

The uncertainty which governs the law of the formalities of contracts is also to be found when an attempt is made to formulate the principles by which capacity to enter into a mercantile contract is governed. The two most common theories are those of the *lex domicilii* and of the *lex loci contractus*. There are sweeping judicial dicta in English cases in favour of both views. Cotton L.J.: "It is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicil."² Sir Creswell Creswell in *Simonin v. Mallac*: "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made."³ Judged from the standpoint of convenience the *lex loci contractus* is the better system to be applied to mercantile contracts. Otherwise it would be possible for persons domiciled in a country where majority is only attained at the age of 25 to plead infancy to claims on contracts entered into in this country at the age of 24. When it is remembered that these persons might be English-speaking British subjects, the opportunities for deceiving unsuspecting tradesmen or business people will be apparent. This may be a criticism of a non-existent rule, and in reality the proper deduction from the authorities may be in accordance with common sense. However, it still remains true to say that conflicting judicial dicta and hesitant pronouncements in the text-books on such an important matter are a grave defect in the English system.

So far the defects that have been dealt with have been mainly defects due to contradictory or faulty authority. In some cases an attempt has been made to show that the present rules on some particular subject should be altered. In connexion with contract we come now to a defect in the theoretical presentment by text-book writers of the rules governing the essential validity, effect, and interpretation of contracts. This defect is the doctrine of the "proper" law, which is not so much a rule to be found in the decided cases as the attempt on the part of the writers to provide a satisfactory theory for the matters mentioned. Actually the rules as to the "proper" law of the contract only confuse the issue and do not solve the problem. The law governing the essential validity of a contract is, according to Dicey⁴ and Cheshire,⁵ the

¹ p. 179.

² *Sottomayor v. de Barros (No. 1)*, 3 P.D. at p. 5.

³ 2 Sw. & T. 67.

⁴ p. 664.

⁵ p. 182.

“proper” law of the contract. This may be compared with the scientific explanation of natural phenomena or the religious explanation of life; the proper law of the contract corresponds to the “ether” of the scientists or the “God” of the theologians. It explains nothing but puts the problem in a slightly different way. What is “ether” or “God”? and what are the rules for ascertaining the proper law of a contract? Fortunately this easy generalization has not had much influence in the courts; rather it is an academic theory posing as a rule of law which is in fact non-existent and would be unnecessary if it existed. A study of the cases on this aspect will show that the judges have evolved rules for ascertaining which law is to govern the particular part of the contract they are considering at the moment. It is true that if many or all of the ingredients of a contract are subject to one law, that law will be characterized by the judge as the predominant law in regard to the contract. In the sense that the contract may be termed an English, a French, or a German contract, there may be said to be a “proper” law. Notwithstanding this, it is impossible to reach any useful conclusions from the theory of the “proper” law; if it is used merely as a description of the law which according to the established rules has been found to apply to the contract, then the expression is harmless and redundant. The break-down of the theory is apparent when the question of illegality is considered. Cheshire is forced to say¹ that essential validity is governed by the proper law of the contract, but that illegality, which is one of the aspects of invalidity, may be governed by more than one system of law. Dicey² puts it in the form of exceptions to his general rule that the proper law of the contract governs validity. His statement that the proper law decides this matter is not helpful when it is realized that a contract illegal by English law or by the *lex loci solutionis* is void, and perhaps³ also if it is illegal by the *lex loci contractus*. It is to be hoped that this particular theory will remain in the more academic atmosphere in which it was born and where it has flourished up to the present time.

Assignments

In connexion with contracts the subject of assignments may next be examined from the critical angle. The law here is defective in so far as it is in a very rudimentary stage, as regards the assignment of debts, of negotiable instruments and what may be called intangible movables. The decisions on the subject are conflicting,

¹ p. 181.

² p. 657.

³ *The Torni*, [1932] P. 78.

indecisive, and obscure; the writings of the leading authors are equally contradictory and certainly more obscure. In the single case of *Republica de Guatemala v. Nunez*¹ four judges advanced no less than five different theories on the validity of and the capacity to make an assignment of a debt, in which they agreed and disagreed with each other in a number of permutations and combinations which would have done credit to the indefatigable selectors of cricket teams in a school arithmetic.

Much difficulty has been caused by s. 72 of the Bills of Exchange Act and its effect on the assignment of bills of exchange, as we shall see later, but even in the case of assignments of tangible movables general uncertainty is to be found. It might have been expected that as to the latter class the authorities would have been more numerous and the theory more established, but such is not the case. Various theories have been adopted as to the law which governs the validity of the assignment of tangible movables. The *lex domicilii*, the *lex situs*, and the *lex actus* have all had their supporters both among judges and text-book writers. However, the chaos in which this subject is involved necessarily means that the rules are not definitely settled and that it is not too late for a set of logical and comparatively simple propositions on assignments to be laid down by the courts. Cheshire has now provided us with a brilliant rationalization of existing decisions which could form the basis of a systematic branch of the law. Cheshire's contribution lies in his distinction² between the claims of assignees arising out of the same transaction and those claims which arise out of different transactions. He points out that where there are rival claimants to a chattel and the claims arise out of different assignments, then neither the *lex domicilii* nor the *lex actus* may be of any assistance. For instance, X domiciled in France assigns a chattel to B domiciled in Germany by an assignment made in Italy and then assigns the same chattel to Z domiciled in the U.S.A. by an assignment made in Sweden. In this case there is no indication as to which of the *leges actus* or *domicilii* should be applied. Cheshire's conclusion is that "a title acquired in accordance with the existing *lex situs* prevails over any other title previously acquired"³ provided no notice of any other title is given to the person who claims under the *lex situs*. This principle would seem to provide a method of solving most of the difficulties surrounding the subject.

¹ 42 T.L.R. 625 & [1927] 1 K.B. 669.

² *Op. cit.*, pp. 338-45, 351 ff.

³ p. 340.

Torts

When we come to torts we find a branch of English private international law which contains several defective rules. Torts committed abroad give a right to an action for damages in England if the act alleged would have been actionable in England and if it was not justifiable by the law of the place where it occurred. The operation of both parts of the rule is not in accordance with sound principle. The case of *Machado v. Fontes*¹ has given a strained meaning to "not justifiable" by including in this term an act which is not a ground for a civil action but which does expose the perpetrator to a criminal prosecution. The result is that a plaintiff can recover heavy damages in England for an act which is not actionable in the country where it was committed. Here the rule is clearly too wide; the rules of the conflict of laws are designed to protect foreign rights but not to create new rights in respect of transactions taking place wholly without the jurisdiction. The first part of the rule shows what Lorenzen calls an illiberal² attitude on the part of English law. So long as the cause of action would not be contrary to English public policy, there seems no reason why the English courts should not enforce a foreign right to damages. A right under a foreign contract which is unenforceable in England will be enforced in England if not illegal; a foreign tort would seem to be on the same footing.³ The reason is probably the distrust of foreign law by the English courts, but this is not a good reason at the present day, and it may well be that with the growth of knowledge of foreign systems of law it will be realized that this distrust is usually misplaced. In addition the damages should, on the theory that the English courts are recognizing a foreign right, be measured by the *lex actus*. According to Cheshire⁴ the English rule is probably in conformity with this principle, but this seems very doubtful. Cheshire seeks to disregard *Machado v. Fontes*, but even if this could be done, on the ground that this case was not directly concerned with damages, the established rules as to the matter of procedure which are determined by the *lex fori* seem inevitably to include damages.

Lastly, there is a complete lack of authority as to the principles on which the place where the act was done is ascertained. Torts by letter, telephone, or telegram, acts of violence commenced in one jurisdiction and finished in another, e.g. the throwing of a

¹ [1897], 2 Q.B. 231.

³ *Ibid.*, p. 499.

² *L.Q.R.*, Vol. XLVII, p. 494.

⁴ p. 551.

stone or the firing of a shot by a man over the border of the Irish Free State and Northern Ireland, or a slander broadcasted in Paris and received in London, all raise problems of which the solutions are not even adumbrated by the decided cases.

Jurisdiction

The fact that the English courts claim for themselves wider jurisdiction than they are prepared to concede to foreign courts should next be noticed. What is sauce for the English goose is not sauce for the foreign gander. An instance of this is the rule that domicile is not sufficient ground for a foreign judgment *in personam* to be enforceable in England. There is no direct authority for the rule, but Atkin J., in *Gavin Gibson & Co. v. Gibson*¹ doubted if domicile was sufficient to give a foreign court jurisdiction. Also the report of the Committee on Foreign Judgments (Reciprocal Enforcement)² did not set out domicile as one of the grounds of jurisdiction when laying down the conditions necessary under Common Law for a foreign judgment to be regarded as that of a court of competent jurisdiction. On the other hand Order XI, rule i (c) of the Rules of the Supreme Court gives the English courts jurisdiction by allowing service out of the jurisdiction of the court "wherever any relief is sought against any person domiciled or ordinarily resident within the jurisdiction". Under this rule it would be possible to serve a person whose domicile of origin was English though in fact there was absolutely no connexion between the defendant and the United Kingdom at all. The grounds on which Order XI allows service out of the jurisdiction are many of them not grounds which in the English courts would justify the recognition of a foreign judgment. A foreign judgment founded only on the fact that a contract made outside its jurisdiction was to be governed by the law of that foreign country would not be recognized. Yet Order XI rule 1 e (11) allows service of a writ out of the jurisdiction if a contract is "by its terms or by implication to be governed by English law". It is true that the court has a discretion under Order XI whether it shall grant leave or not, but it is obviously undesirable that the English courts should arrogate to themselves a jurisdiction greater than that which they are willing to recognize in foreign courts. In addition the rules upon which the jurisdiction of the English courts is founded and upon which a foreign court is deemed to have jurisdiction are in some instances irrational. The jurisdiction of the English courts in actions *in personam* depends

¹ [1913] 3 K.B. 379.

² *Cmd.* 4213.

on whether the person can be served within the jurisdiction or whether the defendant can be served legally out of the jurisdiction, i.e. whether the particular case is covered by the rules of the court as to service out of the jurisdiction. As to the first, it seems curious to found jurisdiction on the mere fact that a person is found, however temporarily, within the jurisdiction of the court. Mere presence, apart from any other connexion with this country, does not seem to justify the existence of jurisdiction, which can be exercised even against a foreign subject whose presence in this country is involuntary, e.g. a prisoner of war. It is true that the court has discretion to interfere where advantage is taken of this doctrine to vex or oppress the defendant, but this is not a satisfactory method of dealing with the whole matter. The principles on which the English courts should exercise jurisdiction should be clearly laid down by defining the cases where they could effectively and properly deal with an action.

Foreign Judgments

At the same time the Common Law rules as to when the jurisdiction of foreign courts is recognized should be clarified and amended to conform with the principles laid down in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. At the present moment the enforcement of foreign judgments is governed by four separate sets of rules, namely the Common Law, the Judgment Extension Acts, the Administration of Justice Act, 1920, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933. First of all there are the judgments of courts outside the United Kingdom which do not come within any of the classes covered by statute. These are the courts of all countries outside the British Dominions, protectorates, and mandated territories, which have not concluded conventions. Up to the present time conventions have been signed only with Belgium and France, and these await ratification; therefore the judgment of all those other countries is governed by the Common Law rules. Leaving aside judgments in Scotland and Ireland, which are in a deservedly privileged position, judgments in the British Dominions are governed by the Administration of Justice Act, 1920, which lays down various rules determining when registration of a judgment will be allowed, and modifying in some respects the Common Law rules as to when recognition would be accorded to judgments of foreign courts. However, the right of enforcing by action a judgment is preserved, registration under the Act being optional.

Lastly, the Common Law rules are modified in a different manner in the Act of 1933¹ which applies to countries with which conventions have been concluded or to British Dominions to which the Act has been extended by Order in Council. The position resulting from these different sets of rules is clearly unsatisfactory. It will be a long time before the Act of 1933 is universally extended and in the meantime the rules as to the recognition of foreign judgments will be different in each particular class. The modifications of the Common Law rules introduced by the Act of 1933 seem obviously to be based on equity and common sense. The proper course would be to have only one set of rules as to the recognition of foreign judgments, while leaving the Acts of 1920 and 1933 to operate on the method of enforcing them. For instance, the Common Law rule is that a defendant who appears in a foreign court under protest merely to dispute the jurisdiction of the court is deemed to have submitted to that jurisdiction.² This is an obviously inequitable rule and is not recognized in the Act of 1933; it is desirable that this and certain other rules which are equally unjust should be changed.

Statute Law

Where the legislature has touched on the rules of private international law it has often disregarded foreign systems of law. Two instances connected with the status of marriage will illustrate this. The Royal Marriage Act of 1772 forbids, subject to certain exceptions, the marriage of descendants of George II unless they have previously obtained the consent of the sovereign. The consequence of this wide prohibition is that the English courts would be unable to recognize the marriage of any descendant of George II who married without the sovereign's consent, and who did not come within the exceptions, even if such person were domiciled in, or the subject of, some other country. On the other hand, our courts would not give effect to a foreign act containing the same provisions, on the ground that it established a status which could not be recognized in England.

It is true that this Act was passed at a time when the rules of private international law were most imperfectly understood, and that the practical effects of this particular piece of legislation are negligible. These considerations do not apply to the Foreign Marriage Act which was passed in 1892, whereby provision was

¹ The Foreign Judgments (Reciprocal Enforcement) Act, 1933.

² *Harris v. Taylor*, [1915] 2 K.B. 580.

made that certain marriages abroad where one of the parties was a British subject should be valid as to form, even though they were void by the *lex loci celebrationis*. The Act further endeavours to prevent conflicts with the law of other countries by providing that a marriage officer shall not be required to celebrate a marriage which, in his opinion, is "inconsistent with international law or the comity of nations". In addition, regulations have been made under the Act which are designed to ensure that the marriages celebrated under the Act should be recognized by the appropriate foreign systems of law. From this aspect the Statute is fairly satisfactory, but it does not provide for the recognition of the law of a foreign country corresponding to the Foreign Marriage Act. It is true that in *Bailet v. Bailet*, 17 T.L.R. 317, a marriage at the French Consulate in London was held valid as to form although it had been performed according to the form of French law. This is, however, no authority for the proposition that the English courts would recognize a marriage celebrated in England between an English and a French subject by a French "marriage officer" in French form.

The truth is that English statute law is very unsatisfactory in its attitude to private international law. In the first place an ordinary English statute which is not specifically dealing with the matter, disregards any question of conflict of laws so completely that the effect of the Act on problems with a foreign element is usually left in doubt. For instance the Age of Marriage Act, 1929, lays down that "A marriage between two persons either of whom is under the age of 16 shall be void".¹ The Act does not state whether it applies only to marriages in England or to all marriages wherever made, or to marriages where both parties or one of them are domiciled in, or subjects of, England. With a little care in drafting, another section could have been enacted laying down the limits of operation of the Act on the conflict of laws.

Even when a statute purports to deal specifically with the English rules of private international law the wording is often inept or even positively harmful. S. 72 of the Bills of Exchange Act, 1882, deals with rules of private international law on the subject of negotiable instruments. This section is obscure and can only be reconciled with the authority and principle by a strained construction of its terms. In subsection 2 it lays down that the "interpretation of the drawing, indorsement, acceptance . . . of a bill is determined by the law of the place where such contract is

¹ Cf. Beckett, *B.Y.I.L.*, 1934, p. 64.

made". It is extremely doubtful what the word "interpretation" means here. Does it include the legal effect of these contracts and does "law of the place" include the rules of private international law of that place? The views of the text-book writers differ as to the law to be applied to the interpretation of a bill of exchange. Let us suppose that the English courts have to apply the section to a bill of exchange accepted in country A and payable in country B. If by the rules of the conflict of laws of country A the law of the *lex loci solutionis* is applied to a bill of exchange, accepted in country A but payable abroad, then it may be that on this footing the "law of the place" means the whole law of the place, and that the law of country B applies because it is the *lex loci solutionis*. The whole difficulty is due to the fact that the Act is apparently laying down an arbitrary rule to be applied to Bills of Exchange which is not in accordance with the general rule that the law to be applied to a contract depends on a number of particular rules. Hence the efforts of text-book writers¹ and judges² to interpret the Act in a sense contrary to the language actually used.

While this subsection of the Act is unsatisfactory because it is expressed in a manner contrary to principle as generally understood, subsection 3 is equally to be condemned on the ground that it is expressed in a most obscure manner. "The duties of the holder with respect to presentment for acceptance or payment and the necessity for, or sufficiency of a protest or notice of dishonour or otherwise are determined by the law of the place where the act is done or the bill is dishonoured." As Westlake points out,³ the wording is strange "by which parliament is made to say that the necessity of an act is to be determined by the law of the place where it is done while it is just when an act has not been done that the question of its necessity arises". Westlake's suggestion that the words "or the act is not done" must be understood, recalls the Middle Western farmer who wished to make his fortune by not growing cotton and not raising hogs under the N.R.A. Dicey suggests more plausibly that the words "or to be done" must be read into the Act. This is not the only difficulty in the section since it refers, as Cheshire points out,⁴ to two systems of law to be distributed between three events, namely presentment, protest, and notice of honour. If the place where the act is done differs from the place where the bill is dishonoured, which law is to govern?

¹ Chalmers, *Bills of Exchange*, p. 282; Falconbridge, *Banking and Bills of Exchange*.

² *Alcock v. Smith*, [1892] 1 Ch. 238 at pp. 256 and 262.

³ S. 231.

⁴ p. 212.

These examples of statutory enactments show that there are two main defects. Firstly, there is a total disregard of the existence of the rules of the conflict of laws in ordinary legislation. Secondly, those statutes which deal directly with this branch of the law are badly drafted and ignore basic principles. The result is confusion and uncertainty, though, as has previously been observed, uncertainty is a defect which is common to the whole of English private international law.

Procedure

The last subject in which defects will be noticed is procedure. The main criticism which can be made of this branch of private international law is that the English classification of procedure is much too wide. The principle that the *lex fori* should govern all matters of procedure is absolutely sound, but the inclusion in the term "procedure" of such matters as limitations, damages, and the Statute of Frauds is unsound. The illogical result of considering damages as matters of procedure has already been pointed out, and it may be said that with regard to limitations the result is the same. The rule is that when the statute of limitations bars the remedy then it falls under the *lex fori*, but that when it extinguishes the claim altogether it is a matter of substance. This means that when the question arises as to whether a foreign statute of limitations should be applied, the English courts have to decide whether the foreign statute bars the remedy or extinguishes the right. The result is that a test is applied to foreign law which in the great majority of cases foreign law does not recognize itself. It would be much more logical and in keeping with the underlying theory of the enforcement of obligations to classify statutes of limitations as matters of substance as is done in France.¹ If foreign rights are enforced in this country on the theory that rights acquired abroad are deserving of recognition, it seems only logical that where the very system which gave rise to that right lays down that it is not enforceable the English courts should give effect to this as well. At present, however, an inquiry is made by the English court into the foreign system to find out what would be the application of a principle which is not applicable to that system. Similar observations may be made on the subject of the Statute of Frauds which has been held in England to be a matter of procedure.² This means that oral agreements made abroad and enforceable by the *lex loci contractus* or the *lex loci solutionis* are

¹ See Beckett in *B.Y.I.L.*, 1934, p. 69.

² *Leroux v. Brown*, 12 C.B. 801.

not enforceable in England if covered by the Statute of Frauds. Here again is a breach of the theory that English private international law is based on the recognition of foreign rights duly acquired. As Beckett points out,¹ the French courts have decided the same point by classifying the corresponding French statute as a matter of substance. It must be said that apart from the wording of the statute the English decision seems illogical. The distinction between the right and the remedy seems unreal when the effect of depriving a person of his remedy in fact deprives him of the right. As the court said in *Cochran v. Ward*² when construing the Statute, a right without a remedy is a mere fiction. On the construction of the statute there is much to be said in support of the decision in *Leroux v. Brown*. The Statute of Frauds lays down that "No action shall be brought unless the agreement . . . or some memorandum or note thereof shall be in writing". The wording "or some memorandum" rather indicates the existence of the agreement apart from the memorandum,³ and the definite prohibition "no action shall be brought" seems to make any other decision impossible. This inconvenient rule can only be remedied by legislation amending the Statute of Frauds.

Dicey

Some of the main defects have now been dealt with, and it will be obvious that there are many other anomalies and illogicalities in the English Conflict of Laws. There is one further matter which may be mentioned as ranking as a major defect in this subject, namely Dicey's *Conflict of Laws*. The pre-eminence of this book is due to the abilities of its original author, who provided the profession and the professors with a text-book which contained an authoritative statement of the law in a series of propositions, often obscure, but always pontifical. The amazing erudition of the present editor has made it possible for this massively repellent volume to contain a prodigious amount of learning. The defect of the book lies in the fact that the outlook is often insular even where there are no English authorities to prevent the laying down of a logical system. Dicey is usually excellent where it is a question of finding all the authorities on a given point, and deplorable where the rules on any particular subject-matter are inchoate,

¹ *B.Y.I.L.*, 1934, pp. 70-1.

² 51 Am. St. Rep. 229.

³ *Heaton v. Eldridge*, 60 Am. St. Reports 737.

e.g. assignments, or the effect of s. 3 of Lord Kingsdown's Act. The danger of the book lies in the great respect paid to it by the courts, who are prone to take for granted¹ the theories of Dicey on the points in question.

¹ E. G. Cozens-Hardy in *re Maudslay*, [1900] 1 Ch. at p. 610. In *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, Bankes L.J. at p. 683, and Lawrence L.J. at p. 695 accept rule 153 of Dicey, but Scrutton L.J. at p. 692 rejects it after critical examination. See also the rejection of Dicey's rule on another point by Lawrence L.J. at p. 701.

THE EFFECT OF WITHDRAWAL FROM THE LEAGUE UPON A MANDATE

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IN a telegram of March 27, 1933, Count Uchida, the Japanese Minister of Foreign Affairs, "gave notice in accordance with the provisions of Article 1, paragraph 3, of the Covenant, of the intention of Japan to withdraw from the League of Nations". In acknowledging receipt of this telegram, Sir Eric Drummond, Secretary-General of the League of Nations, recited the paragraph of the Covenant referred to and promised "to communicate immediately the telegram from the Japanese Government together with his reply to the members of the League".¹ Since it was by no means certain that Japan had fulfilled "all its international obligations and all its obligations under the Covenant" by March 27, 1935, it could not be assumed that Japan ceased to be a member of the League on that date.² In an exchange of notes on March 27, 1935, M. Avenol, the Secretary-General, and the

¹ *League of Nations, Monthly Summary*, March 1933, Vol. XIII, pp. 84-5.

² See on this question Josephine J. Burns, "Conditions of Withdrawal from the League of Nations", *American Journal of International Law*, Vol. XXIX (1925), pp. 40-50. In this connexion the Assembly's report under Article 15, paragraph 4, of the Covenant, adopted February 24, 1933, is of importance. It found it "indisputable that, without any declaration of war, a large part of Chinese territory has been forcibly seized and occupied by Japanese troops and that, in consequence of this operation, it has been separated from and declared independent of the rest of China", and "pointed out in connexion with these events that, under Article 10 of the Covenant, the members of the League undertake to respect the territorial integrity and existing political independence of all members of the League" and that "under Article 12 of the Covenant, the members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council" and concluded that "while at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to lie on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18, 1931". In view of these conclusions and the conclusion that "the sovereignty over Manchuria belongs to China" and "the presence of Japanese troops outside the zone of the South Manchuria Railway and their operations outside this zone are incompatible with the legal principles which should govern the settlement of the dispute, and that it is necessary to establish as soon as possible a situation consistent with these principles" the Assembly "recommended the evacuation of these troops" and the continued non-recognition by members of the League of the existing régime in Manchuria either *de jure* or *de facto*, "the maintenance and recognition (of that régime) being incompatible with the fundamental principles of existing international obligations". (League of Nations Information Section, *Assembly Report on the Chino-Japanese Dispute, February 1933*, pp. 18, 19, 21.)

Japanese Consul-General in Geneva declared that Japan no longer had any rights or obligations under the League Covenant. The Chinese representative at Geneva objected to the Secretary-General's communication on the ground that it constituted a construction of the League Covenant for which the Secretary-General had no authority. To this the Secretary-General replied that his statement referred only to obligations or rights subsequent to withdrawal.¹

On May 7, 1919, before the Treaty of Versailles was signed, the Principal Allied and Associated Powers allotted the mandate for the North Pacific Islands to Japan,² and on December 17, 1920, this mandate was confirmed and its terms defined by the Council of the League of Nations.³ If Japan actually ceases to be a member of the League of Nations, the legal situation of these islands will require consideration.

Certain Japanese writers have insisted that Japan has full title to the mandated islands by virtue of the secret treaties, of her military occupation of these islands, and of their cession to her by the Principal Allied and Associated Powers to whom Germany had ceded them by Article 119 of the Treaty of Versailles. There is clearly no legal basis for this argument. In law the pre-Armistice agreement and the Treaty of Peace superseded any secret treaties, and under the Treaty of Peace the Principal Allied and Associated Powers acquired merely a transitory title to the former German colonies in order to place them under the mandate system provided in Article 22 of the same treaty. The North Pacific Islands were not ceded to Japan by the Principal Allied and Associated Powers, but a mandate in behalf of the League of Nations was conferred upon her. This gave her not sovereignty, but an agency to administer the islands, subject to supervision of the League. According to the larger number of commentators, sovereignty was by this act vested in the League of Nations, the Principal Allied and Associated Powers having passed from the picture. The Council of the League, with the participation of Japan, has on several occasions unequivocally stated that the mandatory is not sovereign of the mandated territory.⁴

¹ *A Monthly Review of World Affairs*, April 1935.

² Transcript of Minutes in League of Nations Assembly, *Records, Session 1 (Sixth Committee)*, p. 375.

³ The text is printed in Q. Wright, *Mandates under the League of Nations* (Chicago, 1930), p. 618.

⁴ *Op. cit.*, pp. 41, 338, 445-7. The Covenant does not actually refer to the North Pacific Islands at all, but they have been treated as though covered by the expression

Without delving into the problem of where sovereignty of the mandated territories is located,¹ it appears that the authority of the mandatory and every other agency having to do with this legal régime derives from Article 22 of the Covenant. The legal effect of the withdrawal of Japan from the League therefore depends upon a proper interpretation of this article.² The discussion, however, cannot be confined to the withdrawal of a mandatory from the League in the abstract. The special circumstances surrounding the Japanese notice of intention to withdraw deserve consideration. We will therefore consider the interpretation and application of Article 22 and the decisions which have been made in execution of it with respect to four questions: (1) Is a mandate terminable, and if so, by whom? (2) May a mandatory which has violated its obligations under the Covenant be deprived of its mandate? (3) Does a mandatory whose mandate was confirmed while it was a member of the League automatically lose its mandate when it ceases to be a member? (4) May a mandate be given to a state not a member of the League?

1. According to Article 22 of the Covenant, the mandatory acts "on behalf of the League" and the system applies only to territories inhabited by peoples "not *yet* able to stand by themselves". These words, as well as deductions from the civil law meaning of the words "tutelage" and "mandate", suggest that the mandates are terminable and that the League decides when. The Italian representative insisted in the Sixth Committee of the Assembly of 1929 that "the essential characteristic" of a mandate is its "temporary character", and while the Australian, New Zealand, and South African representatives combated this idea, it was supported by the representatives of Germany, Norway, Spain, and Switzerland and in a qualified sense by the representa-

"certain of the South Pacific Islands" in paragraph 6 of Article 22, see D. H. Miller, *The Drafting of the Covenant* (New York, 1928), Vol. I, p. 114. Professor Sakutaro Tachi of the Imperial University, Tokio, has expressed the opinion that "territorial rights" (dominium) are vested in the Principal Allied and Associated Powers; that "the exercise of sovereignty" (imperium) is vested in the mandatory; and that the mandates, having the character of a treaty between the Principal Powers and the mandatory, can only be changed with the consent of each. (*Contemporary Japan*, June 1933, pp. 39-40; *Revue de droit international*, No. 4, 1934.) For the present writer's criticism of this theory see *op. cit.*, pp. 321-4, 500-6.

¹ The writer has discussed this at length elsewhere (*Mandates under the League of Nations*, part iii) with the conclusion "that sovereignty of the areas is vested in the League acting through the Covenant-amending process, and is exercised by the mandatory with consent of the Council for eventual transfer to the mandated communities themselves" (*ibid.*, p. 530).

² *Ibid.*, pp. 500-4, 516-18.

tive of France.¹ This conclusion has also been assumed by members of the Permanent Mandates Commission. Lord Lugard wrote in a report to the Commission in 1923, "theoretically the mandate may be revoked", and in 1924, "wherever the power of revocation (in consequence of breach of contract by maladministration) may exist, there can be no doubt that in this almost inconceivable contingency the International Court of Justice would be the agency employed".² In 1925 Madame Bugge-Wicksell wrote to similar effect,³ and M. Rappard, although admitting that the probability of revocation was remote, "did not think the Permanent Mandates Commission should refuse to admit the theoretical possibility of such a revocation. To state that, however unworthy in theory a mandatory might be, its misdeeds could never in any conceivable circumstance lead to revocation, would be to weaken, before public opinion, that sentiment which gives its special value to the institution of which we are the recognized defenders."⁴

The question of the terminability of the mandate of a particular power should be distinguished from the question of the terminability of the mandatory régime in a particular territory. Council resolutions, approved by all the members of the Council including Japan, concerning the security of loans made in behalf of a mandated territory,⁵ concerning sovereignty of mandated territories,⁶ and concerning the conditions necessary for the emancipation of mandated territories in general and in the particular case of Iraq,⁷ are based on the assumption that either the "transfer" or "cessation" of a mandate is possible. The authority of the Council under Article 22, paragraph 8, of the Covenant "explicitly to define in each case the degree of authority, control, or administration to be exercised by the mandatory", the requirement in all of the mandate texts for "the consent of the Council of the League of Nations for any modification of the terms of the mandate", as well as the Council resolutions referred to, suggest that neither transfer nor fulfilment of a mandate can be effected without the consent of the Council of the League.⁸

¹ League of Nations, *Assembly*, 1929, *Sixth Committee Minutes*, *Official Journal*, *Special Supplement*, No. 81, pp. 18 *et seq.*

² Permanent Mandates Commission, *Minutes*, Vol. III, p. 286; Vol. V, p. 177.

³ *Ibid.*, Vol. VI, p. 154.

⁴ *Ibid.*, Vol. VI, p. 157.

⁵ *Official Journal*, 1925, Vol. VI, p. 1511.

⁶ *Ibid.*, 1927, Vol. VIII, p. 1120.

⁷ *Ibid.*, 1930, Vol. XI, p. 77; 1931, Vol. XII, pp. 183-6, 2058; 1932, Vol. XIII, pp. 474, 1212. See also W. H. Ritsher, *Criteria of Capacity for Independence*, Syrian Orphanage Press, Jerusalem, 1934.

⁸ Wright, *Mandates under the League of Nations*, pp. 519-22. It is possible that a mandate might cease through recognition of the independence of the mandated

To say that the Council's consent is required, however, is not to say that the Council alone can transfer or declare the fulfilment of a mandate. It has been suggested on occasions that in addition the consent of the mandatory, of the United States (the only one of the Principal Allied and Associated Powers not permanently represented on the Council), or of the Assembly, is necessary for one or both of these acts. The termination of the British mandate for Iraq was, by the terms of the Council's decisions of 1924 and 1932, dependent upon the admission of Iraq to the League by the Assembly, and in this case Great Britain, the mandatory, had consented. The consent of the United States, however, was not stated to be formally necessary in any commission report or Council resolution, although certain members of the Permanent Mandates Commission had suggested such a necessity.¹ On the whole, the legal material suggests that mandates are in law terminable, but that the consent of both the Council and the mandatory is ordinarily necessary to effect such termination.²

2. Assuming that Japan has violated Articles 10 and 12, it is clear that under Article 16, paragraph 4, of the Covenant, the Council by a vote "concurred in by the representatives of all the other Members of the League represented thereon" might declare Japan to be no longer a member of the League, even if she does not automatically cease to be a member on the expiration of her notice. Whether this would terminate the Japanese mandate depends upon our answer to the third question stated above.³

According to Article 22 of the Covenant, a mandatory must be "an advanced nation who, by reason of its resources, its experience, or its geographical position, can best undertake this responsibility". The interpretation of this provision involves moral and political rather than legal questions, and while it is probable that authority exists somewhere in the League to terminate a mandate

community, admission of that community to the League, or amendment of Article 22 of the Covenant, without the Council's consent. *Op. cit.*, pp. 441, 504-6. See also Wright, "Proposed Termination of the Iraq Mandate", *American Journal of International Law*, 1931, Vol. 25, pp. 436 *et seq.*; Luther H. Evans, "The General Principle governing the Termination of a Mandate", *ibid.*, 1932, Vol. 26, pp. 735 *et seq.*

¹ See memoranda by Van Rees, Permanent Commission, *Minutes*, Vol. XVIII, pp. 170-4; *Minutes*, Vol. XX, pp. 195-201; Lord Lugard, *ibid.*, Vol. XX, pp. 201-3; Count De Penha Garcia differed from his colleagues on this point, *ibid.*, Vol. XX, pp. 203-10.

² Wright, *Mandates under the League of Nations*, pp. 440, 519-22.

³ *Ibid.*, pp. 440-522; Stoyanovski, *La Théorie générale des mandats internationaux*, p. 55.

on such grounds it is not certain that the Council has that power, and there appears to have been no discussion of this point.¹

Authority can be cited to support the League's capacity to terminate a mandate on the ground that the mandatory has violated its legal obligations under Article 22. This is the implication of the opinions of members of the Permanent Mandates Commission and members of the Assembly already cited,² and perhaps of certain of the Council resolutions referred to.³ Assuming that the League has this power under Article 22 it seems probable that the Council would be the agency which would exercise it in ordinary circumstances, although, as it is a legal function, probably the Council would refuse to act until the mandatory's delinquency had been recognized by the Permanent Court of International Justice or other juristic authority. The question of the mandatory's delinquency might be decided in connexion with a dispute submitted to the Court under the compromissory clause of all the mandates in question, and a failure of the mandatory to carry out such decision would entitle the Council, under the final paragraph of Article 13 of the Covenant, "to propose what steps should be taken to give effect thereto". Revocation of the mandate might be an appropriate step. If the problem arose in the Council or Assembly in connexion with the application of Articles 11, 15, or 22, the Court's advisory opinion might be requested.⁴

In such action, it would appear that the Council could act by unanimous vote without counting the vote of the delinquent mandatory. The general requirement of unanimity in Article 5 of the Covenant is modified in Article 15 by giving weight to a recommendation of the Council on a dispute even though the representatives of the litigants fail to concur. This principle of excluding the parties from being judges in their own case was

¹ The Council recognized in 1920 that the League itself could not be regarded as an "advanced nation" and could not properly become a mandatory in its own behalf, so that it declined the offer of the Principal Powers (The Supreme Council) that it undertake the mandate for Armenia. (*Official Journal*, Vol. I, No. 3, pp. 85-7; No. 8, pp. 89 ff.; Wright, *Mandates under the League of Nations*, pp. 439-40.)

² *Supra*, p. 106-7.

³ *Supra*, p. 107, nn. 5, 6, 7. Australia, however, has declared that the League has no power to dismiss a mandatory, and in reply to the question of her representative, the Council's *rapporteur* said the decision with regard to the guarantee of loans in case of transfer of mandate carried no implication in regard to the way in which that might take place. (*League of Nations, Council, Minutes, Session XXIX, Official Journal*, Vol. V, 1076; *Session XXXV, ibid.*, Vol. VI, 1364).

⁴ Wright, *Mandates under the League of Nations*, p. 521.

given a wider application by the Permanent Court of International Justice in the Mosul advisory opinion.¹ It is also to be noted that according to the final paragraph of Article 16 the Council may expel a member for violation of its covenants without counting the delinquent's vote.

While it has not been proved that Japan has violated her obligations as a mandatory, it is to be noted that questions addressed to the Japanese accredited representative at the session of the Permanent Mandates Commission in November, 1932, disclosed that Japan had expended over a million yen for harbour improvements since 1926 in the Island of Saipan, just north of Guam, and suggested that perhaps she was not living up to the obligations of Article 22 and of the mandate that "no naval bases shall be established in the territory". In its report to the Council, the Commission merely stated the Japanese assertion that the object of the improvement was purely commercial.² It was necessary, however, to take up the question again in November, 1934, and the members of the Commission interrogated the accredited representative at length upon the large expenditures for harbour improvements in Saipan and Rota (480,000 yen in 1933), and for subsidies to shipping to these islands (689,000 yen for 1933) compared with the inconsiderable amount of commerce, as well as upon the alarmist reports concerning fortification of the Islands and the difficulties of access to them by foreigners.³ The Marquis Theodoli, President of the Commission, "had always understood that Japanese navigators were excellent, and had never heard that small vessels were less seaworthy than large ones. It was such facts as these which tended to keep alive doubt as to the object of the heavy expenditures incurred in the two small harbours in question. He was sure that, having accepted a mandate over the South Sea Islands with all the obligations involved, Japan would

¹ *Permanent Court of International Justice* (Series B), No. 12, pp. 31-2. See also Wright, *op. cit.*, p. 522.

² Permanent Mandates Commission, *Minutes*, Vol. XXII, pp. 114-15, 179, 319, 367.

³ "M. Orts explained that he did not endorse the allegations made in this connexion. In response to the accredited representative's desire, he read extracts from an article published in the *Stockholms-Tidningen* of August 28, 1934. It was entitled: "A Prohibited World: The Islands under Japanese Mandate: Vast Fortified Territory in the Heart of the Pacific: How the United States of America are kept out of Asia". He also mentioned a note published in a New Guinea newspaper, the *Rabaul Times*, of May 25, 1934. He would be glad to be assured by the accredited representative that access to the islands was open to foreigners who wished to visit them. M. Ito (Japanese accredited representative) thanked M. Orts for the information he had just given. He would give explanations of the concrete cases referred to in the next report". (*Ibid.*, Vol. XXVI, p. 90.)

wish by her explanation to allay the Commission's anxiety".¹ In its report to the Council, the Commission again noted the accredited representative's statement that the sum spent on the equipment of these ports was for purely civil and commercial purposes. "Nevertheless, it appeared to the Commission that the amount of this expenditure was somewhat disproportionate to the volume of commercial activity. The Commission would be glad to find further particulars on this subject in the next report."²

3. Article 22 of the Covenant does not say definitely that a mandatory must be a member of the League, but merely that it must be an "advanced nation". This article does, however, refer in paragraph 5 to the obligation of certain mandatories to maintain the open door for the trade "of *other* members of the League". This, as well as the provisions for annual reports to the Council and for Council supervision of the mandatory's administration, clearly indicates that the drafters of the Covenant assumed that the mandatory would be a member of the League.³

Some of the mandatories, including Japan, were in fact designated by the Principal Allied and Associated Powers before the League was in operation. Consequently, it could not be definitely known that they would become members, although all were states designated as original members in the annex to the Covenant. This fact, and the fact that Article 22 was drafted before any of the rest of the Covenant, doubtless accounts for the failure to specify that the mandatory must be a member of the League.⁴

The Council of the League confirmed all of the mandates, and in every case the mandatory was then a League member. Furthermore, each mandate, including that covering the North Pacific Islands, requires the mandatory to submit to the Permanent Court of International Justice disputes relating to the interpretation or application of the mandate between "the mandatory and *another* member of the League". This indicates the Council's understanding that the mandatory must be a League member.

It is true, however, that the Principal Allied and Associated Powers offered the United States a mandate for Armenia in May, 1920, after the Senate had rejected the League of Nations Covenant, although it was then by no means certain that the United States would not become a member. President Wilson's

¹ *Ibid.*, Vol. XXVI, p. 94.

² *Ibid.*, Vol. XXVI, p. 206.

³ Wright, *Mandates under the League of Nations*, pp. 439-40.

⁴ *Ibid.*, pp. 34 *et seq.*

“solemn referendum” was still to come. However, in this case the Principal Powers acted on the suggestion of the Council of the League in a resolution of April 11, 1920, that “the future of the Armenian nation could best be assured if a member of the League *or some other power* could be found willing to accept a mandate for Armenia under the supervision and with the full moral support of the League under the general conditions laid down under Article 22”.¹ It is to be noted, however, that an original offer to a non-member is not precisely the same as the situation presented by a change in the mandatory’s status after it has received the mandate.

The question whether a mandatory needs to be a League member has not been extensively discussed by commentators, and those who have discussed it are divided.² It is the writer’s opinion that it was the intention of the drafters of Article 22 and of the mandate for the North Pacific Islands that the mandatory should be a member of the League, that it would be very difficult to administer the system with a non-member mandatory at least unless such a mandatory were bound by explicit obligation to act as a member with respect to its obligations as a mandatory, and that, consequently, if Japan should cease to be a member, the mandate given her while a member would terminate.³

4. Even though the presumption from the wording of Article 22 is against a non-member mandatory, and a mandate given to a member terminates when that state ceases to be a member, yet the possibility of conferring a new mandate upon a non-member is not absolutely barred and in fact is supported by the Armenian precedent. A non-member nation, however, before receiving a mandate would have to give special guarantees of its willingness to assume the responsibilities of a member with respect to its mandatory obligations. Although the original mandates were, in accord with Article 119 of the Treaty of Versailles, conferred by

¹ *Official Journal*, Vol. I, No. 3, pp. 85–7; No. 8, pp. 89 *et seq.*; Wright, *Mandates under the League of Nations*, pp. 45–6, 439–40.

² H. Goudy (*Journal of Comparative Legislation and International Law*, 1919, p. 179), J. Stoyanovski (*op. cit.*, p. 55), and Pallière (*I Mandati della Società delle Nazioni*, Turin, 1928, pp. 54–67) believe that the mandatory must be a member of the League; while P. T. Furukaki (*Les Mandats Internationaux de la Société des Nations*, Lyons, 1923, pp. 95–6), L. H. Evans (*American Journal of International Law*, January, 1933, Vol. XXVII, p. 142), S. Tachi (*supra*, p. 105, n. 4), and Paul H. Clyde (*Japan’s Pacific Mandate*, New York, 1935, p. 200) take the contrary view.

³ See also my comments, *Mandates under the League of Nations*, p. 44, and “Some Legal Aspects of the Far Eastern Situation”, *American Journal of International Law*, 1933, Vol. XXVII, p. 516.

the Principal Allied and Associated Powers, and merely confirmed and defined by the League Council, it appears that once this initial transfer was effected the régime was governed by Article 22 alone, and consequently the League, in whose behalf mandatories exercise their function, would, acting through the Council, be competent to confer subsequent mandates.¹

It appears, therefore, that while it should be held that the mandate confirmed to Japan on December 17, 1920, will terminate if Japan ceases to be a member of the League, yet the Council may confirm a new mandate to Japan as a non-member provided Japan gives explicit guarantees to observe the responsibilities of a member with respect to the obligations of Article 22 and the mandate.

Since the United States, by a treaty made with Japan during the Washington Conference of 1921, consented to Japanese administration of the Islands, only "pursuant to the mandate", the text of which was recited in the treaty, the United States, as well as members of the League, have a legal interest in the limitation of Japan's title to the terms intended by the mandates system.²

¹ *Supra*, p. 105, n. 4.

² Wright, *Mandates under the League of Nations*, pp. 486-93.

THE LEAGUE OF NATIONS AND REFUGEES

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As in the Middle Ages it was necessary to find a sanction for any rule of conduct in a text of the Bible, so to-day it is usual to find the sanction for an activity of the League of Nations in a text of the Covenant. The broad humanitarian action of the League on behalf of a helpless section of humanity, the men, women, and children rejected by the state of which they were subjects and driven from their homes, has found its sanction in the large object included in the Preamble to the Covenant: "To promote international co-operation by the maintenance of justice." It has found a sanction also in Article 23 (*a*) of the Covenant, which prescribes that "Members of the League will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations". It may be inferred from the absence of any more directly apposite text that international organization for the assistance of refugees was not contemplated as a definite part of the new order. None the less that action has become one of the most important of the social undertakings of the League.

The movement from country to country of large groups fleeing from racial and religious persecution has been a factor in economic and cultural development of modern times. The expulsion of the Jews from Spain at the end of the fifteenth century drove some three hundred thousand of the most enterprising and intelligent inhabitants of the Peninsula to Italy, Turkey, and later to Holland. The expulsion, a little later, of half a million Moriscos, the survivors of the Moorish occupants of the Peninsula who refused to apostatize, was another element in the decline of Spain. The revocation of the Edict of Nantes in the seventeenth century caused half a million French Huguenots to leave their country and to enrich England and other Protestant states with their enterprise. The population of the United States has, from the beginning, been built up largely of refugees; and in the latter part of the nineteenth century it was increased by millions who sought in the New World the freedom of conscience or of political opinion and the equality of rights that were denied to them in Europe.

No international action was available in the past to deal with refugees. Nor was it so much required. There were always physical and intellectual spaces to be filled; and, broadly speaking, states welcomed an addition to their population of healthy and enterprising elements from abroad. The problem has taken on a fresh colour in the post-war world, because, on the one hand, of the congestion of population in the developed countries, and, on the other, of the economic crisis which is the aftermath of the destruction of war. International co-operation and organization have been called for to deal with the movement and settlement of masses who have been suddenly made homeless; and the League of Nations has come to the aid of national and international philanthropic bodies.

The first intervention of the League was required for the help of the million émigrés from Russia who fled from the Soviet Revolution. They were spread over many countries of Europe, although the largest and most destitute groups were congested in Constantinople and Eastern Europe. In 1921 the International Red Cross Society, finding itself unable to cope with the task, addressed a letter to the Council of the League, asking for help to deal with the juridical and the material conditions of the refugees. The Council decided to nominate a High Commissioner for refugees, and appointed to that office Dr. Nansen, who had just finished the task of repatriating half a million prisoners of war. He held his office until his death in 1930. At first it was hoped that the problem would be temporary, and that it would be possible to repatriate the bulk of the fugitives. That hope had to be abandoned; and by 1924 it was clear that the Soviet Government would not take back Russia's former subjects save under unacceptable conditions. The High Commissioner had then to undertake two different tasks: (1) to regulate the legal status of this large class of stateless persons, and (2) to assist them to find permanent homes and work.

His responsibilities had already been increased by the addition of some three hundred thousand Armenian refugees who were rendered homeless and stateless by the action of the Turks in execution of the provisions of the Treaty of Lausanne. The Council of the League decided, in September 1923, to assimilate the Armenians to the Russian refugees, and to place them under the care of the High Commission. At a later stage, smaller communities of Eastern Christians, the Chaldeans and Assyrians, likewise rendered homeless and stateless by the Turks, were

included in the scope of Nansen's Office, and are referred to as "assimilated refugees". The émigrés were deprived of their Russian and Turkish nationality and of their passports. On the legal aspects of the problem it was necessary to provide them with documents of identity and travel, to establish some agreement as to the law which should govern their civil status, and to secure them some form of protection in the countries in which they were living.

Nansen strove to obtain the agreement of the states in the League to the issue to his denationalized charges of an international passport which should give them the same freedom of movement and the same measure of protection as is enjoyed by nationals of a state. In 1922 he convened an international conference, and the conference adopted an identity certificate which was approved by the Council of the League. He could not accomplish all that he hoped. The governments were fearful of receiving permanently a large number of alien inhabitants, and in the end an inferior status had to be accepted. The "Nansen passport", or certificate, was a document restricted in duration to one year, in scope to a right of movement from one country to another, but without a right of return to the country of issue unless that was expressly accorded, and in its measure of protection to the varying effect which the states were prepared to accord to recommendations of an international conference possessing no binding authority.

In 1928 another conference of the representatives of governments drew up an arrangement concerning the juridical status of the Russian and Armenian refugees. It recommended that the High Commissioner, through his representatives in the different countries, should exercise a number of consular functions, such as:

- (a) certifying the identity and character of the refugees;
- (b) certifying their civil status on the strength of records in the country of origin;
- (c) giving certificates of good conduct, of former service, of university degrees, &c., to the refugees;
- (d) recommending the refugees to the competent authorities in matters of visas, admission to schools, &c.

The representatives of the High Commissioner were to be named in agreement with the governments concerned, and exercise their functions with such agreement. The conference further recommended that the personal status of the refugees should be regulated, in countries where their former national law was no longer recognized, either by the law of the domicil, or, if no domicil

had been obtained, by the law of their residence. Any rights resulting from marriage, or from transactions executed under the old national law of the refugees should, however, be regarded as established rights; and for purposes of divorce the national law of the refugee should be deemed to be the law either of his domicile or of his habitual residence. There followed recommendations to secure to the refugee the enjoyment of certain rights and the benefit of certain privileges accorded by states to foreigners on conditions of reciprocity, and the waiving of the rules which restricted employment of foreign labour. The Assembly of the League in 1928 gave its blessing to the recommendations, and particularly urged that states should not expel a refugee from their country until it had first been ascertained that he would be received into another country. The tossing of the human victim from state to state, interrupted by periods of imprisonment which the victim served for having been compelled to trespass the frontiers, was a standing injustice; and the aim of the *vœu* of the Assembly was that the refugee should not be turned into an outlaw. It has been repeated as a hardy annual in the Resolutions of the Assembly upon the Nansen Office; and, during the year, habitually neglected by the governments.

The agreement was acted upon by certain states particularly concerned, such as France and Belgium, and formed the subject of an international agreement between those two states. Nevertheless, its validity as a legal instrument was questionable; and when finally discussed before the Court of Cassation in France, was not upheld.¹ It was realized that the definition of the legal status of the refugees and of their protection required something more categorical than benevolent recommendations.

In 1930 Nansen died and the Office of the High Commission for Refugees was not maintained. In its place the Nansen International Office was set up by a decision of the Eleventh Assembly to carry on and liquidate the work within a period, under the authority of the League. The political and legal protection of the refugees was to be entrusted to the organs of the League; and a special Refugee Office would take over the humanitarian duties hitherto discharged by the High Commissioner. The plan of liquidation should be completed not later than December 1939; and before the dissolution of the Office a convention should be adopted to define the international status of the refugees. Accordingly a conference of the Governmental Advisory Commission for

¹ *Lebas c. Verdet. Journal du Droit International*, 1932, p. 962.

Refugees, held in the autumn of 1933, drew up a convention which has as its object "to establish conditions which shall enable the decisions already taken by the various states to be fully effective"; in other words, to embody the existing recommendations in a binding international treaty.

The main provisions of the convention, which applies only to Russian, Armenian, and "assimilated" refugees, concern: (1) administrative measures, (2) juridical conditions, (3) labour conditions, (4) welfare and relief, (5) education, (6) the fiscal régime.

As regards (1), the parties undertake to issue Nansen Certificates valid for not less than one year to refugees residing regularly in their territory, and to include in the certificate a formula authorizing return to the country of issue as well as exit. Their consuls may extend the certificates for a period of six months. That provision marks a substantial improvement on the original arrangement for the Nansen Certificates, in regard to the period of validity as well as to the right of return to the country. The parties undertake not to remove or keep from their territory by police measures, such as expulsion or non-admittance at the frontier, any refugee who has been authorized to reside there regularly, unless the measures are dictated by reasons of national security or public order. The convention does not contain an explicit restriction on expulsion of a refugee who has not the right of entering another country. But it is said, negatively, that "each state reserves the right to apply such measures as it may deem necessary to refugees who, having been expelled for reasons of national security, are unable to leave its territory because they have not received the necessary authorizations to proceed to another country".

The convention adopts the principles laid down in the previous agreement concerning juridical conditions. Refugees should have free and ready access to the courts of law; and in countries in which they have their domicile or regular residence they shall enjoy on the same terms as nationals the benefit of legal assistance, and be exempt as plaintiffs in the courts of law from the obligation of giving security for costs.

As to labour conditions, a studiously indefinite article prescribes that "the restrictions ensuing from the application of laws and regulations for the protection of the national labour-market shall not be applied in all their severity to refugees domiciled or regularly resident in the country"; and they shall be automatically

suspended in favour of refugees to whom one of the following circumstances applies:

- (a) he has been resident for not less than three years in the country;
- (b) he is married to a person possessing the nationality of the country;
- (c) he has one or more children possessing that nationality;
- (d) he is an ex-combatant of the World War.

Refugees who are victims of industrial accidents are to receive the most favourable treatment which is accorded to foreign nationals. In cases of unemployment, sickness, invalidity, or old age, and also in the application of social insurance laws, the refugees are to receive the most favourable treatment accorded to nationals of a foreign country. They are to have the same rights in the schools and universities as are accorded to foreigners in general; and, lastly, they are not to be subject to any exceptional duties, charges or taxes.

The convention shall come into force as soon as ratifications or accessions have been received on behalf of at least two members of the League or non-member states. It may be denounced after the expiration of five years from the date on which it comes into force, and reserves may be made by any signatory to any part of the convention. In fact, the representatives of Belgium and France made certain reservations, the Belgian with regard to unemployment insurance and social insurance, the French with regard to the application of laws and regulations fixing the proportion of wage-earning foreigners. The governments showed no undue haste in implementing the project; and the Assembly of 1934 adopted a resolution inviting them to ratify the convention without delay in order that the problem may be liquidated.

The work of the Nansen Office is by no means restricted to the provision of identity and travel documents and of quasi-consular protection for its refugees. Together with philanthropic organizations which are associated with the work, it has contrived to find homes for some tens of thousands of the homeless. It has actually been engaged in the work of settlement, particularly of the Armenians, of whom some twenty thousand have been distributed in agricultural and industrial colonies in Syria, and another twenty thousand transported to the Soviet Republic of Erivan, which is a substitute for the Armenian national home. Its settlement operations extend to all countries of the world. Thus it has been instrumental in emigrating to Paraguay thousands of Mennonite

refugees from Russia, who were stranded in Harbin, and in emigrating to Brazil another group of Lutheran refugees, also from Russia, who were the descendants of earlier German refugees and have still kept their German character. It still looks after more than a million persons who are distributed over the wide world; and it has its representatives in the principal states who keep the groups in touch with the Central Office in Geneva. It has, therefore, something of the character of an international consular service.

As to its organization, the Governing Body is composed of persons appointed by the League, by an inter-governmental Advisory Commission for Refugees, by the International Labour Office and by an Advisory Committee of Refugee Relief Organizations. An inter-governmental Advisory Commission, which is attached directly to the League, contains the representatives of fourteen states, including Great Britain. The Advisory Committee of Refugee Organizations contains representatives of some forty national and international philanthropic bodies. It is one of the principal characteristics of the refugee organization of the League to combine the philanthropic action of private bodies with international government action. The League Office is the bridge. The report of the Nansen Office is considered each year by the Sixth Commission of the Assembly, and forms the subject each year of a resolution of the Assembly.

The Convention of 1933 expressly provides for the Russian, Armenian and assimilated refugees. It would cover the Assyrians now forced to emigrate from Iraq, as well as those who were earlier driven from Turkey and have been settled in Syria. It would not, however, cover the large number of refugees from other countries who need as urgently the help of the League and some international regulation of their status. The growing practice in the totalitarian or corporative state of depriving the leaders, and often the ordinary members, of the opposing parties of their nationality and driving them from the country, creates groups of stateless refugees in nearly all the countries of Europe. They were formerly Italians, Hungarians, Austrians, &c. They now have the protection of no state, and, as stateless aliens, have the greatest difficulty both in travelling and in obtaining employment. In 1927 the Assembly of the League invited the Council to request the High Commissioner for Refugees and the International Labour Organization to study how the measures of protection and settlement in favour of Russian and Armenian refugees

could be extended to other similar groups. Action, as we have seen, was taken for the specific groups of Assyrians, Chaldeans, and a small number of Turks. It was not then, and has not since been, taken for those other groups which are more definitely composed of political exiles. The Inter-Governmental Commission, which drew up the convention of 1933, recommended the Council to reconsider the question of extending to other categories the arrangement for the Nansen refugees. But again the Council in May 1934 decided that that would be inopportune, and emphasized that each government should be at liberty to decide what treatment should be applied to refugees in its territory.

One general measure, however, affecting all persons deprived of nationality, was devised by an organ of the League; not by the High Commissioner for Refugees, but by the Communications and Transit Organization, at its third General Conference in 1927. That body considered the introduction of some kind of passport for stateless persons and persons of doubtful nationality, and in the end adopted a series of recommendations to governments to employ a uniform "document of identity and travel" which should be similar to the Nansen certificate and should normally bear the mention "Good for return" to the country of issue, so that the holder would more readily obtain a visa for entry to another country.

The Expert Committee which devised the document had, indeed, larger aspirations. They proposed that the document should be employed by states for any person who could not obtain a national passport, whether he was stateless, or whether for political or other reasons he could not obtain a travel document from the country of which he was still a subject. Their proposal, however, aroused the opposition of the representatives of the totalitarian states, and in the end was abandoned. Most of the states members of the League accepted the recommendations in principle; but in practice bureaucratic conservatism has prevented the adoption of a uniform document for these stateless persons, and most countries continue to issue some special document of their own. In England it is a "document of identity" given by the Home Office, in Germany a *Fremdenpass*, in Holland a *Gunstpass*, and so forth. If the stateless refugee has been delivered from the pain of immobility, he is far from having obtained the national's liberty of travel. The more radical improvement of his lot would be to provide facilities for his acquiring a new nationality; and the Assembly of the League, in 1928, adopted a Resolution inviting

the governments concerned to extend to this end facilities for the refugees in the countries in which they at present resided.

A more recent attempt to meet some of the needs of refugees not covered by the Nansen Agreement was made at the end of 1933, when a Committee of Experts, appointed by the Council in 1931 for the study of assistance to indigent foreigners, met at Geneva and drew up a draft convention. Many bilateral treaties have been concluded between nations providing for assistance to indigent subjects of the contracting states. It was the view of the Expert Committee that these obligations should be generalized by an international, or multilateral, convention. The convention which they drafted prescribes that the benefit of the measures proposed shall be extended not only to nationals of the contracting parties, but also to "refugees as defined in the Geneva Agreements of May 12, 1926, and June 30, 1928 (that is, the Nansen refugees), and by the administrative practice of the countries in which they are regularly authorized to reside, together with stateless persons and persons of indeterminate nationality". They recommended that the governments shall not remove from their territory by means of police measures, such as deportation or expulsion, indigent persons who are refugees without nationality or of indeterminate nationality, until they have received visas and facilities to proceed to another country. Necessary assistance should be assured them so long as they remain in the country of residence. The British expert, however, stated that he must refrain from adopting an attitude towards the article which embodied this principle; and the experts of Denmark, Switzerland, and the United States were doubtful about the willingness of their countries to enter into any international convention providing for assistance to indigent foreigners. On the other hand, the Committee adopted a recommendation "that the participation of foreigners in the benefits of unemployment insurance and various forms of assistance to unemployed should be regulated as early as possible, and in the most liberal manner, by means of an International Labour Convention on the basis of the principle of equality of treatment".

As has often happened, the international radicalism which is expressed in conferences at Geneva has been checked by national conservatism when the recommendations are examined by the governments. The International Labour Conference of 1934, acting upon the recommendation of the Committee, passed a resolution urging the formulation of an International Convention

which should regulate in a definite and liberal manner the rights of foreign unemployed workers to participation in public assistance on the same terms as other unemployed persons whose right to allowances has expired. But when the draft convention and recommendations of the Committee were considered by the Fifth Commission of the Assembly in 1934, it was found that of the seventy governments to which they were submitted, only twenty had submitted observations. So diverse were these observations that it was impossible to arrive at any opinion as to the possibility of concluding the convention in its present form. The Commission then, like the other which dealt with the convention on the international status of refugees, contented itself with the expression of the hope that the governments which had not yet sent their observations would send them as soon as possible to the Secretariat of the League.

A different aspect of the refugee problem, the exchange of populations between two states, has been a concern of the League during the last ten years. The movement of peoples in the Near East formed the subject of international treaties during the years immediately preceding the World War. Following on the Balkan Wars, Turkey and Bulgaria concluded a convention for the exchange of their populations in Thrace, and set up a Mixed Commission with representatives of the two states and a neutral element to supervise the operation. Then, in 1914, Turkey and Greece entered into a similar convention for the purpose of exchanging the Moslem population in Macedonia and the Greek population on the coast of Asia Minor. The same machinery of a Mixed Commission was to be set up, but the scheme was frustrated by the outbreak of the war. At the end of the war the Treaty of Neuilly (1919) provided for the exchange of Bulgarian and Greek populations in Macedonia, so that the subjects of either state should be transferred to the territory of their state; and the machinery of the League was invoked for the establishment of the commission to carry it out. A much larger and more urgent problem of the kind was forced upon the attention of the League in 1922 when, following on the collapse of the Greek invasion of Asia Minor, nearly two million Greek Orthodox subjects of Turkey were driven from their homes in that country. The outcasts were massed in the ports of Greece, a country impoverished and wearied by ten years of almost continuous warfare. It was clear that neither the Greek Government alone nor philanthropic organizations could tackle this huge problem of repatriation and settlement.

The League was induced to set up a Greek Refugee Commission, which was attached to its Finance and Economic Section. An American Chairman and British directors with large experience of Indian settlement were appointed to the Commission; an international loan was placed, principally in England and America, for an amount of £10,000,000—subsequently raised to £12,000,000—to provide funds for settlement, and was secured on certain revenues of the Greek Government; and the Commission was given plenary powers by the Greek State to proceed with the agricultural and urban colonization of the fugitives. The record of its work is well known, and this is not the place to deal with it. It forms one of the brighter spots in the history of international co-operation through the League. It suffices to say that the work of the International Commission was completed in eight years, and it was possible, in 1931, to hand over the completion of the liquidation to the Greek Government.

Two minor operations of the exchange of populations between Bulgaria and Greece, and Bulgaria and Turkey have proceeded smoothly under the auspices of the League. While the transfer of the Orthodox to Greece, and of the Moslems to Turkey in accordance with the Convention signed at Lausanne in 1923, was compulsory, the exchange of these other smaller populations was carried out by reciprocal and voluntary emigration controlled by Mixed Commissions. It was the function of the Commission, to which the League appointed a president chosen from a neutral nation, to supervise the migration, to facilitate the transfer of the movable property, and the valuation and liquidation of the immovable property of the emigrants, and to make arrangements for the sum due to the exchanged population in each country on account of the property liquidated to constitute a government debt to the country to which the proprietors emigrated. A few difficult questions of the settlement have been referred for Advisory Opinion by the Council, at the instance of the Commission, to the Permanent Court of International Justice. That same tribunal was called upon to decide a vexed question which arose between Greece and Turkey as to the persons to be included in the compulsory transfer of populations. The advice of the Court¹ has been unquestioningly adopted by the parties. In this replanting of the population of the Near East, the machinery of the League has worked helpfully and constructively.

The governing principle of these migrations was that to unmix

¹ *Publications of the P.C.I.J., Series B*, No. 10.

the populations of the Near East would tend to secure the pacification of the region. The broad result has been that the populations of Macedonia and of Asia Minor and Anatolia have become homogeneous. The Turks have received half a million Moslems from Europe, and they have lost two million Greeks; the Greeks and Bulgarians have exchanged some hundred thousands of their populations in the border marches. Politically, the exchange has so far proved a signal success. The old political and religious jealousies that turned the Near East of Europe into a cockpit of warring peoples have been replaced by understanding. With the migration of populations Balkanization has migrated west. What will be the ultimate result of the exchange it is too early to say. At present it has tended to stimulate amazingly the economic development of Greece, and to weaken the economic position of Turkey.

A new and difficult problem of refugees was brought before the Assembly of the League in 1933. The National-Socialist revolution in Germany had forced some sixty thousand persons to leave the country, either because they were of Jewish race and were deprived on that ground of their positions in the government, the professions, the institutes of learning, and private employment, or because they were political "undesirables" on account of their Socialist, pacifist, or international opinions, and had to choose between persecution and exile. In normal times the absorption of a number of intellectual and energetic emigrants in other countries would have been an easy task, not calling for any organized international effort. But the economic crisis made the times very abnormal, and the task one of the greatest difficulty and embarrassment.

The Netherlands Delegation invited the Assembly to regard the settlement of these refugees who had been received into the countries adjacent to Germany as "an economic, financial, and social problem that can be solved only by international collaboration". The Second Commission of the Assembly, to which the proposal was referred, adopted a resolution which urged that the Council should nominate a High Commissioner to negotiate and direct the international collaboration, and particularly to provide, as far as possible, work for the refugees in countries which are able to offer it. The German Delegation, which at first said that it would disinterest itself in the matter, later opposed the proposal that the High Commissioner should be directly attached to the League; and, in order to overcome that opposition, it was agreed to set up an autonomous organization. The final form of the

resolution therefore stated that the Council of the League should "invite states, and, if it thinks it advisable, private organizations best able to assist refugees, to be represented on a Governing Body of which the duty will be to aid the High Commissioner in his work", and to receive periodical reports from him on the development and fulfilment of his task. The resolution was passed by the Assembly, and in due course the Council appointed an American, Mr. James G. MacDonald, as the High Commissioner, and invited fifteen states to send representatives to the Governing Body. Twelve immediately accepted the invitation; they included all the countries adjacent to Germany, and in addition Great Britain, Italy, Sweden, the United States and Uruguay. Subsequently Yugoslavia was added.

The High Commission, like the Nansen Office, is an autonomous organization, but it is more completely detached than that Office from the League. The reports of the High Commissioner are not submitted to the Council of the League, as are those of the Nansen Office, nor will they be brought before the Assembly of the League until, anyhow, the work of the High Commission is completed, and the Office can be brought to an end. The organization of the new High Commission is otherwise similar to that of the Nansen Office. Besides the Governing Body, which, as Lord Cecil, its Chairman, has remarked, does not govern, there is an Advisory Council of representatives of the philanthropic organizations which are concerned with the refugees, and two permanent committees have been chosen from the Governing Body and from this Advisory Council.

The problem of providing the refugees with a document of identity and travel has been solved—in principle indeed more than in practice—without any formal international agreement, by the application of the recommendations of the Conference of 1927—mentioned above—concerning the stateless and persons of doubtful nationality. The great majority of the refugees remain German subjects, but some thousands had been stateless persons in Germany, and some thousands have been rendered stateless since they left by cancellation of their German nationality. Many of the refugees who are still Germans cannot obtain a renewal of their German passports, or a new German document from the German consular authorities. In these cases, as well as in those of stateless persons, the governments have been invited, and have generally agreed, to employ the "International Passport", as it is called, of 1927, or some document which they use for persons not entitled to

a national passport. It was not found necessary to devise any new or exceptional document similar to the Nansen certificate. The German Government, which for the most part has dissociated itself from the work of the Commission and been unwilling to co-operate, has at least consented to give to those of its subjects who are refused a renewal of their German passport, a written intimation to that effect. An official writing is required by the authorities in several states before they are willing to issue to the foreign national a document of identity and travel.

The recommendations of the Governing Body of the High Commission are not embodied in any diplomatic instrument, nor have they any binding force. They are simply recommendations of practice to the state authorities concerned. That character applies equally to the proposals concerning permits of residence (*permis de séjour*) and permits of work (*cartes de travail*), which are required in several of the states to enable refugees to stay in the country and—what is more rarely granted—to work in the country. It applies to the Voeux urging, e.g. that states shall not expel a refugee from one country till it has been ascertained that he has been permitted to enter another. The relations of the autonomous organization of the High Commissioner for the Refugees from Germany with the governments are entirely those of persuasion and consultation; and if they are not the less efficacious for that reason, they are not efficacious enough in this period of economic nationalism. The value of the international organization established by the League—though early orphaned from it—simply is that it can represent through government delegates to the government offices the specific matters on which co-operation and a common understanding are necessary.

A fresh refugee problem confronted the League at the beginning of 1935, after the plebiscite in the Saar region gave a majority for reunion with Germany. Besides some two thousand Germans who had taken refuge there since 1933, and who were now forced to move on, some thousands of the inhabitants of the Saar felt themselves menaced by the National-Socialist régime, and in the first place turned to France. The French Government announced that it would receive the fugitives, but at the same time it urged that the emigration was the concern, first and foremost, of the League. It was the League's mission to prevent the growth of the problem by securing the strict observance of the undertakings given by Germany that she would not countenance any acts of reprisals upon those who had voted against reunion. The Council

of the League and the Permanent Court of Arbitration were charged with the enforcement of those undertakings. The League had a special responsibility for those who, nevertheless, fled from the Saar, beyond its general responsibility of a humanitarian character; for the inhabitants of the Saar were, in a sense, its former subjects. It should accordingly be prepared to meet from its budget the cost of maintenance and settlement of those refugees.

That was the French demand. The Council at its meeting in January contented itself with instructing the rapporteur on refugee questions to lay proposals before it at the next session. It may be presumed that the proposals will recommend the creation of a new class of refugees within the scope of the Nansen Organization. They are the direct responsibility of the League, while the refugees from Germany are a delegated responsibility.

The present piecemeal treatment of the problems of the refugees as they arise before the League has proved to be unsatisfactory. In a recent debate in the House of Lords (February 1935), Viscount Cecil urged that the British Government should consider the question of refugees as a whole, and the amalgamation of the different organizations into one organization directly under the League of Nations. He attached great importance to that, not only because of the financial aspect of the question, but because such an organization would become subject to the whole of the machinery of the League. Public opinion would be kept alive as to what was actually going on, and the Assembly would and could debate the matters if there were anything that called for it. Such an organization would be able to give help to the groups of political outcasts who are to-day the waifs and strays of the international society, and who would thus have some organ to which they could turn for protection. It would mean also that the burden of caring for the refugees would be more fairly distributed between the states.

The international society cannot escape responsibility by shelving the question of outcasts and stateless persons, or by leaving it to private charitable organizations to do what they can, in this era of economic crisis and of world-wide xenophobia, to enable them to live. It was pointed out in the debate by the spokesman of the British Government that the matter could only be raised at the next Assembly of the League. But it may be hoped that it will be raised there effectively.

Surveying the record for the last fifteen years, it may be said

that the League activity on behalf of refugees has been manifested in two contrasted developments. The action in assisting the exchange of populations marks hopefully the success of international effort in a constructive treatment of the problem of racial and religious minorities. The activities of the two High Commissioners for Refugees, who have been appointed in special emergencies, and the more continuous activities of the Nansen Office, indicate that something can be done by the organization of humanitarian feeling under the League, both to secure for certain sections of outcasts of the nations a minimum of human rights, and to assist them in establishing a new home and to salvage their powers and talents for civilization. The large problem of stateless persons, a problem which in spite of *vœux* of the Assembly is steadily growing in gravity, remains to be tackled.

THE MEMBERS OF THE LEAGUE OF NATIONS

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IN 1934 the *British Year Book of International Law* published a list of members of the League of Nations, with the dates of the commencement of their membership,¹ and the editors expressed an intention to repeat the list, duly brought up to date, in subsequent issues. The writer's interest was challenged by certain entries in the 1934 list, and he was led to review some of his previous studies of the subject² in an effort to check and complete its information. It may not be possible to draw up an absolutely unquestionable list, for, strange as it may seem, the task is not merely a mechanical one. Numerous appreciations are involved, and no solution of some of the legal questions can be wholly free from doubt.

Difficulty arises, first of all, in stating the names, in some cases the English names, of certain members of the League of Nations. The usage is not uniform in all cases, and for some of the members delicate questions may be involved. Nor is it easy to determine the precise date on which some states became members of the League. This is particularly true of some of the states listed in the Annex to the Covenant as "States invited to accede to the Covenant".

The Covenant must be read in its setting. It forms a part of four treaties of peace:³ the Treaty of Versailles of June 28, 1919;⁴ the Treaty of St. Germain of September 10, 1919;⁵ the Treaty of

¹ The signatories of the Treaty for the Renunciation of War, of August 27, 1928, were also listed. See p. 138.

² "Membership in the League of Nations", *American Journal of International Law*, Vol. XVIII (1924), pp. 436-58; "Mexico's Admission to the League of Nations", *ibid.*, Vol. XXVI (1932), pp. 114-17; "Admission of Turkey to the League of Nations", *ibid.*, Vol. XXVI (1932), pp. 813-14; "Admission of Iraq to the League of Nations", *ibid.*, Vol. XXVII (1933), pp. 133-8; "The Argentine Republic and the League of Nations", *ibid.*, Vol. XXVIII (1934), pp. 125-33; "Afghanistan, Ecuador, and the Soviet Union in the League of Nations", *ibid.*, Vol. XXIX (1935), pp. 109-16.

³ It also formed a part of the abortive Treaty of Sèvres of August 10, 1920. *British and Foreign State Papers*, Vol. CXIII, p. 652.

⁴ The Treaty of Versailles first entered into force on January 10, 1920. For the text of the *procès-verbal* dated "le dix janvier 1920, à seize heures quinze minutes", see Kraus and Rüdiger, *Urkunden zum Friedensvertrage* (1921), II, pp. 920-2. See also Appendix I, *infra*. The text of the treaty is published in *British and Foreign State Papers*, Vol. CXII, p. 1.

⁵ The Treaty of St. Germain first entered into force on July 16, 1920. *Staatsgesetz-*

Trianon of June 4, 1920;¹ and the Treaty of Neuilly of November 27, 1919.² In a sense there are four Covenants of the one League of Nations; but it seems more accurate to say that there are four versions of the one Covenant. These versions do not vary in wording, yet the expression "by the terms of the present treaty" in paragraph 1 of Article 5, obviously bears a special meaning in each of the versions. In connexion with the membership of the League of Nations, the history of each of these four treaties may be important in some cases.³

Of the fifty-nine members of the League of Nations (on April 1, 1935), only twenty-two are parties to the Treaty of Versailles, though twenty-six members (not including Germany, which is one of the parties) became such by reason of the deposit of ratifications of the Treaty of Versailles.⁴ Some of these members are parties also to others of the treaties of peace. One member, China, became such by reason of the deposit of a ratification of the Treaty of St. Germain; and one member, Roumania, became such by reason of the deposit of ratifications of the Treaty of St. Germain and the Treaty of Neuilly. The members which acceded to the Covenant during the early months of 1920 must have acceded to the Covenant in the Treaty of Versailles, and in some cases this was specifically stated.⁵ Eighteen members became such by reason of their admission by the Assembly; if the admission took place in 1920, it would seem that they became parties to the Covenant in the Treaty of Versailles, the Treaty of St. Germain, and the Treaty of Neuilly; if it took place since 1920, it would seem that they became parties to the Covenant in all four of the treaties of peace.

Surprising informality is to be noted in the process by which some of the members were admitted to the League; in some cases,

blatt, 1920, p. 1245. The text of the treaty is published in *British and Foreign State Papers*, Vol. CXII, p. 317.

¹ The Treaty of Trianon first entered into force on July 26, 1921. (French) *Journal Officiel*, 1921, p. 9887. The text of the treaty is published in *British and Foreign State Papers*, Vol. CXIII, p. 486.

² The Treaty of Neuilly first entered into force on August 5, 1920. The text of the treaty is published in *ibid.*, Vol. CXII, p. 781.

³ Sir John Fischer Williams has stated that the connexion of the Covenant with the treaties of peace is not "permanent or integral", and that "it is an error to regard it as a continuing and perpetual association". Williams, *Some Aspects of the Covenant of the League of Nations* (1934), pp. 25, 27.

⁴ The British Dominions and India are not separately parties to the Treaty of Versailles.

⁵ The Chilean and Spanish declarations of accession were explicit on this point. *League of Nations Official Journal*, 1920, pp. 15, 16.

no formal instrument was ever signed, and yet it cannot be doubted that each of the members has assumed the obligations of the Covenant, and is entitled to all the privileges conferred by it. While admission has not in any case been subject to conditions, recommendations made to certain states formed a part of the process of admission,¹ and action taken in pursuance of such recommendations therefore has some significance in this connexion.

Article 1 of the Covenant established no procedure by which states should be invited to accede, though it required accession to be effected "by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant", i.e. by March 10, 1920. In October, 1919, the Supreme Council of the Allied Powers seems to have given some attention to the form of the invitations to be issued,² but the precise nature of its deliberations is not known to the writer. On January 10, 1920, on the coming into force of the Treaty of Versailles, the President of the Peace Conference, M. Clemenceau, addressed to the governments of states named in the Annex telegraphic invitations to accede to the Covenant; on the same day, he informed diplomatic representatives of these states that the invitations had been despatched and that the period of two months allowed for accession should be counted from that date.³ It seems that in some instances acceptances of the invitation may have been addressed to the President of the Peace Conference, while others were addressed to the Secretary-General of the League of Nations; complete information as to all of the acceptances is not available to the writer.

Even prior to January 10, 1920, however, some of the states listed as "States invited to accede to the Covenant" addressed communications to the Secretary-General-designate of the League-of-Nations-to-be, purporting to effect accession to the Covenant. It seems clear that unless specific provision is made to the contrary,⁴ an accession to an international instrument cannot be effected

¹ On December 15, 1920, the First Assembly adopted a recommendation that "in the event of Albania, the Baltic and Caucasian States being admitted into the League, the Assembly requests that they should take the necessary measures to enforce the principles of the Minorities Treaties", the details being arranged with the Council. *Records of the First Assembly, Plenary*, pp. 568-9.

² See Kluyver, *Documents on the League of Nations* (1920), p. 187; von Bülow, *Der Versailler Völkerbund* (1923), p. 16.

³ *La Paix par le Droit*, Vol. XXX (1920), pp. 43, 44.

⁴ Some multipartite instruments provide for their coming into force on the deposit of a certain number of ratifications or accessions. See, e.g., Article 14 of the Convention concerning Economic Statistics, of December 14, 1928. *League of Nations Treaty Series*, Vol. CX, pp. 171, 191; Hudson, *International Legislation*, Vol. IV, pp. 2575, 2587.

prior to the entry into force of that instrument. This seems to have been expressly provided in the Treaty for the Renunciation of War of August 27, 1928,¹ and orderly procedure would seem to have required it with reference to the Covenant. Sir Eric Drummond must have taken this view, for in acknowledging the communications received he stated that he "assumes, unless he hears to the contrary, that these communications may be regarded as the formal acts of accession of the several governments to the Covenant of the League, as soon as the Covenant comes into force".² It is therefore improper to list any state as having become a member of the League of Nations before January 10, 1920, though, possibly because of an ambiguous statement published by the Secretariat of the League of Nations,³ many current lists fall into this error.

For practical purposes, it may not be very important to determine the date of commencement of membership in the League of Nations. Historically, such dates seem to be of interest, however, and numerous lists of the members purport to give them.⁴ It seems desirable therefore that an unimpeachable list should be available, and perhaps it might be prepared by the Secretariat at Geneva.

The following list is offered, employing the words of the editors of the *Year Book*, "for the use of students of international law", as the most nearly accurate list which the writer can produce from readily available documents.⁵ In this list, the names of the members are given as they appear in a list published by the Secretariat of the League of Nations on October 1, 1934, and in the same order.⁶ If no date is given for the commencement of membership, it is because the writer is in doubt as to the date.⁷

¹ Article 3 of the Paris Treaty provided that it should "when it has come into effect . . . remain open . . . for adherence". See Publication No. 468 of the U.S. Department of State, entitled *Treaty for the Renunciation of War*, pp. 7-8.

² *League of Nations Official Journal*, 1920, p. 13.

³ *Ibid.*, p. 300.

⁴ See, e.g., Eagleton, *International Government* (1932), p. 401; Harley, *Documentary Textbook on International Relations* (1934), p. 123; C. Howard Ellis, *The Origin, Structure and Working of the League of Nations* (1928), p. 100; Jackson and King-Hall, *The League Year-Book*, 1934, pp. 1-2; Ottlik, *Annuaire de la Société des Nations*, 1920-7, pp. 681 *et seq.*; Pollock, *League of Nations* (2nd ed., 1922), pp. 190-1. See also *Congressional Record*, Vol. LXXIX (1935), p. 915.

⁵ Many of the documents on the history of the treaties of peace subsequently to the dates of signature have not been published.

⁶ *League of Nations Document*, C.403, M.182, 1934. V.

⁷ Rules for the computation of time, such as those which prevail in the municipal law of most countries, have not been established in international law. See Francis Deak, "Computation of Time in International Law", *American Journal of International Law*, Vol. XX (1926), pp. 502-15.

I. LIST OF MEMBERS OF THE LEAGUE OF NATIONS

(April 1, 1935)

1. *Abyssinia*. September 28, 1923.

Abyssinia applied for admission to the League on August 1, 1923, and the admission was voted by the Fourth Assembly on September 28, 1923.¹ On the previous day the Abyssinian delegation had signed a declaration "with regard to the questions of slavery and of traffic in arms".² The English name of this Empire is frequently given as Ethiopia;³ the Secretariat of the League of Nations now employs "Abyssinia" in English and "Éthiopie" in French.

2. *Afghanistan*. September 27, 1934.

The Kingdom of Afghanistan applied for admission to the League on September 24, 1934, and the admission was voted by the Fifteenth Assembly on September 27, 1934.⁴

3. *Union of South Africa*. January 10, 1920.

South Africa was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Union of South Africa resulted from the deposit at Paris of His Britannic Majesty's ratification of the Treaty of Versailles on behalf of the British Empire, on January 10, 1920.⁵

4. *Albania*. December 17, 1920.

Albania applied for admission to the League on October 19, 1920. The admission was voted by the First Assembly on December 17, 1920.⁶ In pursuance of a recommendation of the First Assembly of December 15, 1920, that Albania "should take the necessary measures to enforce the principles of the Minorities Treaties", a declaration concerning the protection of minorities in Albania was signed at Geneva, October 2, 1921.⁷ Albania was declared to be a republic in 1925, and it became a Kingdom in 1928.

5. *Argentine Republic*.

The Argentine Republic was named in the Annex to the Covenant as a state invited to accede. It moved to effect an accession soon after the signature of the Treaty of Versailles. On July 18, 1919, the Argentine Minister in Paris informed Sir Eric Drummond that the Republic adhered unreservedly to the Covenant.⁸

¹ *Records of the Fourth Assembly, Plenary*, pp. 124-5, 375-6.

² *League of Nations Treaty Series*, Vol. XXV, p. 179.

³ It is commonly listed as "Ethiopia" in publications of the United States Department of State. See Publication No. 468, entitled *Treaty for the Renunciation of War* (Washington, 1933).

⁴ *Records of the Fifteenth Assembly, Plenary*, pp. 74-7. See the writer's comment in *American Journal of International Law*, Vol. XXIX (1935), pp. 110-11.

⁵ For the text of the *procès-verbal* of January 10, 1920, see Kraus and Rödiger, *Urkunden zum Friedensvertrage*, II, p. 920; and Appendix I, *infra*. His Britannic Majesty's ratification is reproduced in Appendix II, *infra*.

⁶ *Records of the First Assembly, Plenary*, pp. 651, 668-70.

⁷ *League of Nations Treaty Series*, Vol. IX, p. 173. Albania's ratification of the declaration was deposited at Geneva on March 22, 1922. Cf. *Publications of the Permanent Court of International Justice*, Series A/B, No. 64.

⁸ *League of Nations Official Journal*, 1920, p. 13.

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In reply to Sir Eric Drummond's acknowledgment, on July 29, 1919, he stated that "the Government of the Argentine Republic adheres to the League of Nations, and it will ratify this adhesion as soon as the Chambers have given their approval".¹ On January 10, 1920, the Secretary-General of the League of Nations notified the Argentine Minister of Foreign Affairs that other governments had been notified of the Argentine accession to the Covenant.² On January 16, 1920, the President of the Republic informed the President of the Peace Conference that a formal ratification was transmitted "under the conditions of accession expressed in the note of July 18, 1919".³ The Argentine Republic was represented at the First Assembly, but its delegates withdrew from the Assembly before the close of the session. Thereafter, its co-operation in the work of the League was intermittent; in certain years contributions were paid; but formal approval of the Covenant by the Congress seems to have been postponed until September 26, 1933.⁴ In 1933 the Argentine Republic was elected to representation on the Council. A resolution of the Fifteenth Assembly of September 27, 1934, cancelling the obligation of the Argentine Republic to pay contributions for certain previous years, referred to it as having "stood in a special relationship to the League" prior to 1933.⁵

6. *Australia.*

January 10, 1920.

Australia was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Commonwealth of Australia resulted from the deposit at Paris of His Britannic Majesty's ratification of the Treaty of Versailles on behalf of the British Empire, on January 10, 1920.⁶

7. *Austria.*

December 15, 1920.

Austria was a signatory of the Treaty of St. Germain, which came into force for Austria on July 16, 1920.⁷ As it was not named in the Annex to the Covenant, it did not become a member of the League of Nations in consequence of this fact. On November 11, 1920, Austria applied for admission to the League of Nations, and the admission was voted by the First Assembly on December 15, 1920.⁸

8. *Belgium.*

January 10, 1920.

Belgium was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Kingdom of Belgium resulted from the deposit at Paris of a ratification of the Treaty of Versailles on January 10, 1920.

9. *Bolivia.*

January 10, 1920.

Bolivia was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Bolivia resulted from

¹ *Ibid.*, p. 14.

² Sivori, *La Liga de las Naciones* (1928), pp. 507-8.

³ *Ibid.*, p. 506.

⁴ *League of Nations Document*, A. 30. 1933. See also the writer's comment in *American Journal of International Law*, Vol. XXVIII (1934), pp. 125-33.

⁵ *Records of the Fifteenth Assembly, Plenary*, p. 84.

⁶ Kraus and Rödiger, *op. cit.*, Vol. II, p. 920. See also Appendix II, *infra*.

⁷ *Staatsgesetzblatt*, 1920, p. 1245.

⁸ *Records of the First Assembly, Plenary*, pp. 570-9. See also the Austrian *Bundesgesetzblatt*, 1927, p. 1145.

Bolivia's being named in the first *procès-verbal* of deposit of ratifications of the Treaty of Versailles on January 10, 1920, though the Bolivian ratification was not actually deposited at Paris until a later date.¹

10. *British Empire.*

January 10, 1920.

The British Empire was named in the Annex to the Covenant as an original member of the League of Nations. The Treaty of Versailles was signed on behalf of the British Empire, and its membership resulted from the deposit at Paris of His Britannic Majesty's ratification on behalf of the British Empire, on January 10, 1920. In the publications of the League of Nations, the designation of the member represented by British representatives has not been uniform. The minutes of the early sessions of the Council generally designated "British Empire"; those of the seventh session designated "Great Britain" (Fr., *Royaume-Uni*), however, and those of the eleventh session designated "United Kingdom" (Fr., *Royaume-Uni*); from 1921 till the end of 1931, the "British Empire" was designated consistently; a change came in the Council minutes of February 29, 1932 (66th session), the designation being "United Kingdom". Since September, 1932, the designation in the Council minutes is "United Kingdom of Great Britain and Northern Ireland". In the records of the Assembly, the "British Empire" was designated as the member represented down to 1931; since that date the "United Kingdom of Great Britain and Northern Ireland" is designated.²

11. *Bulgaria.*

December 16, 1920.

Bulgaria was a signatory of the Treaty of Neuilly, which came into force for Bulgaria on August 9, 1920. As it was not named in the Annex to the Covenant, it did not become a member of the League in consequence of this fact. The Kingdom of Bulgaria applied for admission to the League on November 6, 1920, and the admission was voted by the First Assembly on December 16, 1920.³

12. *Canada.*

January 10, 1920.

Canada was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Dominion of Canada resulted from the deposit at Paris of His Britannic Majesty's ratification of the Treaty of Versailles on behalf of the British Empire, on January 10, 1920.

13. *Chile.*

January 10, 1920.

Chile was named in the Annex to the Covenant as a state invited to accede. By a letter dated November 4, 1919, the Secretary-General-designate of the

¹ The concluding paragraphs of the Treaty of Versailles may be construed to have provided that the treaty would come into force on the date of the first *procès-verbal* for a non-European state which had informed the French Government of its ratification and which was named in the first *procès-verbal*, even though its ratification was not deposited until a later date.

² The representative of the British Empire on the Council of the League of Nations has been said to be "in practice, the representative of the United Kingdom and those portions of the Empire which are not separate Members of the League". Palmer, *Consultation and Co-operation in the British Commonwealth* (1934), pp. 80, 126. See also Noel-Baker, *Present Juridical Status of the British Dominions* (1929), pp. 88 *et seq.*; H. Duncan Hall, *The British Commonwealth of Nations* (1920), p. 341; Sir Cecil Hurst, in *Great Britain and the Dominions* (1928), pp. 91 *et seq.*

³ *Records of the First Assembly, Plenary*, pp. 581-2, 597-605.

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League of Nations was notified of an accession to the Covenant by the Republic of Chile.¹ This was treated as a definitive declaration of accession on the coming into force of the Covenant on January 10, 1920.

14. *China.*

July 16, 1920.

China was named in the Annex to the Covenant as an original member of the League of Nations. It was a signatory of the Treaty of St. Germain, but not of the Treaty of Versailles. Its membership in the League resulted from China's being named in the first *procès-verbal* of deposit of ratifications of the Treaty of St. Germain on July 16, 1920, though its ratification was not actually deposited at Paris on that date.

15. *Colombia.*

February 16, 1920.

Colombia was named in the Annex to the Covenant as a state invited to accede. On February 12, 1920, the Secretary-General of the League of Nations informed the Council that a draft of a Colombian accession had been submitted to him, indicating that by acceding to the Covenant Colombia did not wish to be committed to a recognition of the independence of Panama. The Secretary-General was directed to express no opinion on this point.² A declaration of accession by the Republic of Colombia was deposited with the Secretariat on February 16, 1920.³

16. *Cuba.*

March 8, 1920.

Cuba was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Cuba resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on March 8, 1920.⁴

17. *Czechoslovakia.*

January 10, 1920.

Czechoslovakia was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Czechoslovak Republic resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

18. *Denmark.*

March 8, 1920.

Denmark was named in the Annex to the Covenant as a state invited to accede. A declaration of accession by the Kingdom of Denmark was deposited with the Secretariat on March 8, 1920.⁵

19. *Dominican Republic.*

September 29, 1924.

The Dominican Republic applied for admission to the League of Nations on September 23, 1924, and the admission was voted by the Fifth Assembly on September 29, 1924.⁶

20. *Ecuador.*

September 28, 1934.

Ecuador was named in the Annex to the Covenant as an original member of the League of Nations. Though a signatory of the Treaty of Versailles, the

¹ *League of Nations Official Journal*, 1920, p. 15.

² *Minutes of the fourth meeting of the Second Session of the Council*, p. 5.

³ *League of Nations Official Journal*, 1920, p. 300.

⁴ (French) *Journal Officiel*, 1920, p. 3938; (German) *Reichsgesetzblatt*, 1920, p. 339.

⁵ *League of Nations Official Journal*, 1920, p. 300.

⁶ *Records of the Fifth Assembly, Plenary*, pp. 184-5, 469-70.

Republic of Ecuador has not deposited a ratification at Paris. By a telegram addressed to the Secretary-General of the League of Nations on September 27, 1934, received on September 28, 1934, the President and Minister for Foreign Affairs declared that "Ecuador has decided to become a member" of the League. On September 28, 1934, the Council received a representative of Ecuador as a representative of a member of the League of Nations.¹

21. *Estonia.*

September 22, 1921.

The Republic of Estonia applied for admission to the League on June 7, 1920, but the admission was refused by the First Assembly on December 16, 1920.² The application was renewed on August 6, 1921, and the admission was voted by the Second Assembly on September 22, 1921.³ In pursuance of a recommendation of the First Assembly of December 15, 1920, that the Baltic States "should take the necessary measures to enforce the principles of the Minorities Treaties", a representative of Estonia made a declaration before the Council of the League of Nations on September 10, 1923.⁴

22. *Finland.*

December 16, 1920.

The Republic of Finland applied for admission to the League of Nations on June 30, 1920.⁵ The admission was voted by the First Assembly on December 16, 1920.⁶

23. *France.*

January 10, 1920.

France was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the French Republic resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

24. *Germany.*

September 8, 1926.

The German Reich was a signatory of the Treaty of Versailles, which came into force for Germany on January 10, 1920. As it was not named in the Annex to the Covenant, it did not become a member of the League of Nations in consequence of this fact. On February 8, 1926, the Reich applied for admission to the League of Nations.⁷ The Special Assembly which dealt with the matter in 1926 reached no agreement.⁸ The admission was voted by the Seventh Assembly on September 8, 1926.⁹

¹ *League of Nations Official Journal*, 1934, pp. 1468-9. See the writer's comment in *American Journal of International Law*, Vol. XXIX (1935), pp. 111-12.

² *Records of the First Assembly, Plenary*, pp. 615-27, 635-6.

³ *Records of the Second Assembly, Plenary*, pp. 317-18, 333-5.

⁴ *League of Nations Official Journal*, 1923, p. 1311.

⁵ *Ibid.*, 1920, pp. 270-1.

⁶ *Records of the First Assembly, Plenary*, pp. 584-5; 607-10. On the protection of minorities in Finland, in line with the recommendation of the First Assembly of December 15, 1920, see *Minutes of the fourteenth session of the Council*, 1921, pp. 116-17, 163-4.

⁷ A previous *démarche* had been made by Germany on December 12, 1924. *League of Nations Official Journal*, 1925, pp. 323-7, 490-1. See the full account of Germany's relation to the League in Schücking and Wehberg, *Die Satzung des Völkerbundes* (3rd ed., 1931), Vol. I, pp. 319-41.

⁸ See Records of the 1926 Special Assembly, in *League of Nations Official Journal*, 1926, *Special Supplement*, No. 42.

⁹ *Records of the Seventh Assembly, Plenary*, pp. 31-6.

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By a letter dated October 19, 1933, received by the Secretary-General on October 21, 1933, the Government of the Reich gave notice of an intention to withdraw from the League.¹

25. *Greece.* March 30, 1920.

Greece was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Hellenic Republic resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on March 30, 1920.²

26. *Guatemala.* January 10, 1920.

Guatemala was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Guatemala resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

27. *Haiti.* June 30, 1920.

Haiti was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Haiti resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on June 30, 1920.³

28. *Honduras.* November 3, 1920.

Honduras was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Honduras resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on November 3, 1920.⁴

29. *Hungary.* September 18, 1922.

Hungary was a signatory of the Treaty of Trianon, which came into force for Hungary on July 26, 1921. As it was not named in the Annex to the Covenant, it did not become a member of the League of Nations in consequence of this fact. On May 23, 1921, Hungary applied for admission to the League,⁵ but on September 24, 1921, it requested that a decision on the application be postponed.⁶ In reporting on the matter to the Third Assembly, the Sixth Committee took note of a "spontaneous" assurance by the Hungarian representative that the "Hungarian National Assembly will not fail to ratify with the least possible delay the obligations assumed by Hungary towards the League of Nations".⁷ The admission was voted by the Third Assembly on September 18, 1922.⁸

30. *India.* January 10, 1920.

India was named in the Annex to the Covenant as an original member of the League of Nations. Its membership resulted from the deposit at Paris of His

¹ *League of Nations Official Journal*, 1934, p. 16. The Government's decision was approved by the German people in a popular referendum on November 12, 1933.

² (French) *Journal Officiel*, 1920, p. 5070; (German) *Reichsgesetzblatt*, 1920, p. 622.

³ (French) *Journal Officiel*, 1920, p. 9410; (German) *Reichsgesetzblatt*, 1920, p. 1440.

⁴ (German) *Ibid.*, 1921, p. 54.

⁵ *League of Nations Official Journal*, 1921, pp. 269-70.

⁶ *Ibid.*, p. 989.

⁷ *Records of the Third Assembly, Plenary*, Vol. II, pp. 122-3. A statute concerning the admission of Hungary into the League of Nations (No. XII, 1923) was passed by the National Assembly on February 1, 1923. *Corpus Juris Hungarici*, 1923, p. 108.

⁸ *Records of the Third Assembly, Plenary*, Vol. I, pp. 115-18.

Britannic Majesty's ratification of the Treaty of Versailles on behalf of the British Empire, on January 10, 1920.¹

31. *Iraq.* October 3, 1932.

The termination of the Mandate for Iraq under the arrangements approved by the Council of the League of Nations on September 24, 1924,² was agreed upon by the Council on January 28, 1932, to be effective on Iraq's admission to the League of Nations.³ The Kingdom of Iraq applied for admission on July 12, 1932. The admission was voted by the Thirteenth Assembly on October 3, 1932.⁴

32. *Irish Free State.* September 10, 1923.

The Irish Free State applied for admission to the League of Nations on April 17, 1923,⁵ and the admission was voted by the Fourth Assembly on September 10, 1923.⁶

33. *Italy.* January 10, 1920.

Italy was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Kingdom of Italy resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

34. *Latvia.* September 22, 1921.

The Latvian Republic applied for admission to the League of Nations on May 14, 1920, but the admission was refused by the First Assembly on December 16, 1920.⁷ The application was renewed on August 15, 1921, and the admission was voted by the Second Assembly on September 22, 1921.⁸ In pursuance of a recommendation of the First Assembly of December 15, 1920, that the Baltic States "should take the necessary measures to enforce the principles of the Minorities Treaties", a representative of Latvia made a declaration before the Council on July 7, 1923, which was confirmed by the Latvian Government on September 1, 1923.⁹

¹ "India was admitted a member of the League of Nations in 1919 as a recognition of the services rendered to the Allied cause, but the attitude of the Indian Government on all issues has been subject to the ultimate control of the British Government, though the Indian representatives at the Assembly and in the Labour Organization have normally presented the special views of India in accordance with the general opinion of the Indian legislature." Palmer, *Consultation and Co-operation in the British Commonwealth* (1934), p. liv.

² *League of Nations Official Journal*, 1924, p. 1346; Hudson, *International Legislation*, Vol. I, p. 122.

³ A declaration was made in this connexion by Iraq on May 30, 1932, and deposited with the Secretariat on July 13, 1932. *League of Nations Document*, A. 17, 1932, VII.

⁴ *Records of the Thirteenth Assembly, Plenary*, pp. 46-52, 111-12. See the writer's comment in *American Journal of International Law*, Vol. XXVII (1933), pp. 133-8.

⁵ This application was sanctioned by the League of Nations (Guarantee) Act, 1923, passed by the Oireachtas, August 8, 1923. *Public General Acts, Irish Free State*, 1923, p. 1206.

⁶ *Records of the Fourth Assembly, Plenary*, pp. 23-4, 166.

⁷ *Records of the First Assembly, Plenary*, pp. 627-30, 636-7.

⁸ *Records of the Second Assembly, Plenary*, pp. 318-19, 335-7.

⁹ *League of Nations Official Journal*, 1923, pp. 933, 1275.

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35. *Liberia.*

June 30, 1920.

Liberia was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Liberia resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on June 30, 1920.¹

36. *Lithuania.*

September 22, 1921.

Lithuania applied for admission to the League of Nations on October 12, 1920, but the admission was refused by the First Assembly on December 16, 1920.² The application was renewed on August 26, 1921, and the admission was voted by the Second Assembly on September 22, 1921.³ In pursuance of a recommendation of the First Assembly of December 15, 1920, that the Baltic States "should take the necessary measures to enforce the principles of the Minorities Treaties", a declaration concerning the protection of minorities in Lithuania was signed at Geneva, May 12, 1922.⁴

37. *Luxemburg.*

December 16, 1920.

The Grand Duchy of Luxemburg applied for admission to the League of Nations on February 23, 1920, reserving the privilege of maintaining its neutrality.⁵ On November 28, 1920, the representatives of Luxemburg confirmed "that Luxemburg will accept without any reservations the obligations arising from the Covenant of the League of Nations, and, in particular, from Article 16 of the Covenant", and stated that the Government undertook to propose to the Legislative Assembly the necessary changes in the Constitution of the Grand Duchy.⁶ The *rapporteur* of the Fifth Committee of the First Assembly stated to the Assembly that "the request for admission, under condition of neutrality, may be regarded as withdrawn. We are now only faced by a simple request for admission." On this basis the admission was voted by the First Assembly on December 16, 1920.⁷ On December 23, 1920, the Minister of Foreign Affairs, acknowledging a notification of the admission stated that "the Grand Ducal Government will, without delay, refer to the legislative power a proposal confirming the modification of the neutrality of the Grand Duchy brought about by the obligations laid upon her by the Council of the League of Nations".⁸ The Government of the Grand Duchy later raised with the Secretary-General the question as to its status; the Secretary-General replied, with the Council's approval, that its admission was "final and absolute".⁹ Information available to the writer does not indicate that the changes envisaged have been made in the constitution of the Grand Duchy.

¹ (French) *Journal Officiel*, 1920, p. 9410; (German) *Reichsgesetzblatt*, 1920, p. 1440.

² *Records of the First Assembly, Plenary*, pp. 627-30, 637-9.

³ *Records of the Second Assembly, Plenary*, pp. 319-20, 337-40.

⁴ *League of Nations Treaty Series*, Vol. XXII, p. 393.

⁵ *Minutes of the Fifth Session of the Council*, 1920, pp. 140-3.

⁶ *Records of the First Assembly, Plenary*, p. 612.

⁷ *Ibid.*, pp. 585-7, 610-12.

⁸ *League of Nations Official Journal*, 1921, pp. 96-7.

⁹ *Ibid.*, pp. 706-8; *Minutes of the Thirteenth Session of the Council*, 1921, pp. 21, 171-3. See Albert Wehrer, "Le Statut International du Luxembourg et la Société des Nations", *Revue Générale de Droit International Public*, Vol. XXXI (1924), pp. 169-202.

38. *Mexico.*

September 12, 1931.

On September 8, 1931, with a view to repairing the omission of the name of Mexico in the Annex to the Covenant, the Twelfth Assembly voted an invitation to Mexico to accede to the Covenant.¹ This invitation, later described as "exceptional",² was accepted by a reply dated September 10, 1931, and on September 12, 1931, the Assembly declared Mexico to have become a member of the League of Nations.³

By a letter dated December 3, 1932, the Mexican Government gave notice of an intention to withdraw from the League, explaining that "this step does not mean that Mexico will be inevitably obliged to leave the League", but was taken "in prevision of a possibility of her being no longer able to continue her membership in view of the period of depression through which the national economy is passing".⁴ This notice was cancelled by a letter dated May 5, 1934.⁵

39. *Netherlands.*

March 9, 1930.

The Netherlands was named in the Annex to the Covenant as a state invited to accede. A declaration of accession by the Netherlands was deposited with the Secretariat on March 9, 1920.⁶

40. *New Zealand.*

January 10, 1920.

New Zealand was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Dominion of New Zealand resulted from the deposit at Paris of His Britannic Majesty's ratification of the Treaty of Versailles on behalf of the British Empire, on January 10, 1920.

41. *Nicaragua.*

November 3, 1920.

Nicaragua was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Nicaragua resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on November 3, 1920.⁷

42. *Norway.*

March 9, 1920.

Norway was named in the Annex to the Covenant as a state invited to accede. A declaration of accession by the Kingdom of Norway, dated March 5, 1920,⁸ was deposited with the Secretariat on March 9, 1920.⁹

43. *Panama.*

November 25, 1920.

Panama was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Panama resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on November 25, 1920.¹⁰

¹ *Records of the Twelfth Assembly, Plenary*, p. 37.

² *Ibid.*, p. 92.

³ *Ibid.*, p. 93. See the writer's comment in *American Journal of International Law*, Vol. XXVI (1932), p. 114.

⁴ *League of Nations Official Journal*, 1933, p. 395.

⁵ *Ibid.*, 1934, p. 428.

⁶ *Ibid.*, 1920, pp. 262, 300.

⁷ (German) *Reichsgesetzblatt*, 1921, p. 54.

⁸ *League of Nations Official Journal*, 1920, pp. 260-1.

⁹ *Recueil des Traités de la Norvège*, Vol. II (1926), p. 960.

¹⁰ (German) *Reichsgesetzblatt*, 1921, p. 54. The ratification had previously been announced by telegram; but the inclusion of Panama in a list of members of the

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44. *Paraguay.*

January 10, 1920.

Paraguay was named in the Annex to the Covenant as a state invited to accede. On October 29, 1919, a declaration of accession by the Republic of Paraguay was communicated to the Secretary-General-designate of the League of Nations.¹ This seems to have been treated as a definitive accession upon the coming into force of the Covenant.

By a telegram dated February 22, 1935, received by the Secretary-General on the same day, the Paraguayan Government gave notice of an intention to withdraw from the League.²

45. *Persia.*

January 10, 1920.

Persia was named in the Annex to the Covenant as a state invited to accede. On November 21, 1919, a declaration of accession by Persia was communicated to the Secretary-General-designate.³ This seems to have been treated as a definitive accession upon the coming into force of the Covenant. On January 13, 1920, in reply to the invitation of President Clemenceau to accede to the Covenant,⁴ the accession was confirmed. On March 22, 1935, the official name of the state was changed to *Iran*.

46. *Peru.*

January 10, 1920.

Peru was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Peru resulted from Peru's being named in the first *procès-verbal* of deposit of ratifications of the Treaty of Versailles on January 10, 1920, though the Peruvian ratification was not actually deposited at Paris until March 9, 1920.⁵

47. *Poland.*

January 10, 1920.

Poland was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Poland resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

48. *Portugal.*

April 8, 1920.

Portugal was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Republic of Portugal resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on April 8, 1920.⁶

League on July 30, 1920, published in the *League of Nations Official Journal*, 1920, p. 299, seems erroneous. Panama was represented in the First Assembly which opened on November 15, 1920.

¹ *League of Nations Official Journal*, 1920, pp. 13, 14. Another date, for which the writer finds no justification, is given in *ibid.*, p. 300.

² *Ibid.*, 1935, p. 451. Cf. Josephine Burns, "Conditions of Withdrawal from the League of Nations", *American Journal of International Law*, Vol. XXIX (1935), p. 40.

³ *League of Nations Official Journal*, 1920, pp. 13, 15.

⁴ Kluyver, *Documents on the League of Nations*, pp. 236-7.

⁵ (French) *Journal Officiel*, 1920, p. 3994.

⁶ (French) *Ibid.*, 1920, p. 5622; (German) *Reichsgesetzblatt*, 1920, p. 622.

49. *Roumania.*

September 4, 1920.

Roumania was named in the Annex to the Covenant as an original member of the League of Nations. It was a signatory of the Treaty of Versailles, and on December 9, 1919, it acceded to the Treaty of St. Germain and the Treaty of Neuilly.¹ On September 4, 1920, Roumania's ratifications of the Treaty of St. Germain² and of the Treaty of Neuilly were deposited at Paris; as both of these treaties had previously entered into force, this deposit may be taken to have made the Kingdom of Roumania a member of the League of Nations on that date. The Roumanian ratification of the Treaty of Versailles was deposited at Paris on September 14, 1920.³

50. *Salvador.*

March 10, 1920.

Salvador was named in the Annex to the Covenant as a state invited to accede. On March 10, 1920, a declaration of accession by the Republic of El Salvador was deposited with the Secretary-General of the League of Nations.⁴

51. *Siam.*

January 10, 1920.

Siam was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Kingdom of Siam resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

52. *Union of Soviet Socialist Republics.*

September 18, 1934.

On September 15, 1934, delegates to the Fifteenth Assembly of the League of Nations representing thirty members of the League despatched to the People's Commissariat for Foreign Affairs at Moscow an invitation to the Union of Soviet Socialist Republics to become a member of the League of Nations; on the same date the Governments of Denmark, Finland, Norway, and Sweden informed the Government of the Union of Soviet Socialist Republics that their representatives would vote in favour of its admission to the League.⁵ On September 18, 1934, the admission was voted by the Fifteenth Assembly.⁶

53. *Spain.*

January 10, 1920.

Spain was named in the Annex to the Covenant as a state invited to accede. A declaration of accession by the Kingdom of Spain was deposited with the Secretariat on January 10, 1920.⁷

By a letter dated September 8, 1926, received by the Secretary-General on September 11, 1926, the Spanish Government gave notice of its intention to withdraw from the League.⁸ This notice was cancelled by a letter dated March 22, 1928.⁹

¹ The text of the act of accession is not available to the writer; apparently the accession was effected subject to ratification.

² (Austrian) *Bundesgesetzblatt*, 1920, p. 265.

³ (German) *Reichsgesetzblatt*, 1920, p. 1859.

⁴ *League of Nations Official Journal*, 1920, pp. 263, 300.

⁵ *Records of the Fifteenth Assembly, Plenary*, p. 58.

⁶ *Ibid.*, pp. 62-4. See the writer's comment in *American Journal of International Law*, Vol. XXIX (1935), pp. 112-16.

⁷ *League of Nations Official Journal*, 1920, p. 16. The name of the state is now the Republic of Spain.

⁸ *Ibid.*, 1926, p. 1528.

⁹ *Ibid.*, 1928, p. 603.

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54. *Sweden.*

March 9, 1920.

Sweden was named in the Annex to the Covenant as a state invited to accede. On March 9, 1920, a declaration of accession by the Kingdom of Sweden was deposited with the Secretariat at London.¹

55. *Switzerland.*

March 8, 1920.

Switzerland was named in the Annex to the Covenant as a state invited to accede. On February 11, 1920, representatives of the Helvetic Confederation appeared before the Council to explain that a declaration of accession would be deposited within the time limit set by the Council, but that the decision would have to be ratified by the vote of the people and the cantons, and that if the vote should be unfavourable Switzerland would ask to be allowed to withdraw; they requested, also, a statement concerning the future of Swiss neutrality.² On February 12, 1920, the Council adopted a resolution agreeing to the proposed procedure and recognizing that "the perpetual neutrality of Switzerland and the guarantee of the inviolability of her territory as incorporated in the law of nations, particularly in the Treaties and in the Act of 1815, are justified by the interests of general peace and as such are compatible with the Covenant".³ A declaration of accession deposited with the Secretariat on March 8, 1920,⁴ was subject to confirmation in the Swiss plebiscite. The result of the plebiscite, held on May 16, 1920, was favourable to the continuance of the membership.⁵

56. *Turkey.*

July 18, 1932.

On July 6, 1932, an invitation to the Turkish Republic to become a member of the League of Nations was voted by the Special Assembly.⁶ The invitation having been extended, on July 9, 1932, the Turkish Minister for Foreign Affairs replied accepting the invitation;⁷ he added that "Turkey is in a special position as a consequence of military obligations ensuing from the Conventions signed at Lausanne on July 24, 1923", and he therefore recalled "the terms of the note which was signed by representatives of Belgium, France, the British Empire, Italy, Poland and Czechoslovakia on December 1, 1925", and quoted a paragraph of this note relating to the obligations of Article 16 of the Covenant.⁸ With this reply before it, the Special Assembly voted the admission of Turkey on July 18, 1932.⁹

¹ *Ibid.*, 1920, pp. 262, 300.

² *Minutes of the Second Meeting of the Second Session of the Council*, pp. 2-9.

³ *Minutes of the Fourth Meeting of the Second Session of the Council*, pp. 6-7, 46-7. See also *Minutes of the Sixth Meeting*, pp. 20-5.

⁴ *League of Nations Official Journal*, 1920, p. 300.

⁵ On the question, generally, see Max Huber, "Die Schweizerische Neutralität und der Völkerbund", in Munch, *Les Origines et l'œuvre de la Société des Nations* (1924), Vol. II, pp. 68 *et seq.*; W. E. Rappard, *L'Entrée de la Suisse dans la Société des Nations* (1924), pp. 56 *et seq.*

⁶ *Records of the 1932 Special Assembly (League of Nations Official Journal, Special Supplement No. 102)*, Vol. II, pp. 17-21.

⁷ *Ibid.*, pp. 21-2.

⁸ For the text of this note see *League of Nations Official Journal*, 1926, p. 636.

⁹ It may, however, be possible to say that the acceptance of the invitation resulted in Turkey's becoming a member. Cf. the writer's comment in *American Journal of International Law*, Vol. XXVI (1932), pp. 813-14.

57. *Uruguay.*

January 10, 1920.

Uruguay was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Oriental Republic of Uruguay resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.

58. *Venezuela.*

Venezuela was named in the Annex to the Covenant as a state invited to accede. A declaration of accession, "subject to the ratification of the accession by the Congress of the United States of Venezuela", was executed by the temporary President of the Republic on January 12, 1920. This declaration was communicated to the Secretary-General of the League of Nations, by a letter dated March 3, 1920.¹ The law by which the Congress of Venezuela confirmed the accession was dated June 25, 1920, but it was not approved by the President until October 12, 1920.²

59. *Yugoslavia.*

February 10, 1920.

The Serb-Croat-Slovene State was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the Kingdom of the Serbs, Croats, and Slovenes resulted from the deposit at Paris of a ratification of the Treaty of Versailles on February 10, 1920.³ The name of the Kingdom was changed to "Kingdom of Yugoslavia" by a law of October 3, 1929.

II. LIST OF STATES NOT MEMBERS OF THE LEAGUE OF NATIONS (April 1, 1935)

A listing of the states which are not members of the League of Nations involves delicate appreciations. No universally accepted criterion exists for determining which are the communities which play a sufficient role in the family of nations to be entitled to be called "States". If the tests usually set are to be applied,⁴ some communities are on the border line between dependence and independence. Nor is it possible to say precisely which are the "fully self-governing" states, dominions or colonies which might be eligible for admission to membership in the League under Article 1 of the Covenant.

The following list of states not members of the League of Nations on April 1, 1935, may serve the ordinary needs of students of international law, only if they will bear in mind the possibility of challenging some of its inclusions as well as some of its exclusions.⁵

¹ *League of Nations Official Journal*, 1920, pp. 259-60.

² *Recopilacion de Leyes y Decretos de Venezuela*, Vol. XLIII (1920), pp. 911-18.

³ (French) *Journal Officiel*, 1920, p. 4138; (German) *Reichsgesetzblatt*, 1920, p. 390.

⁴ See e.g. Article 1 of the Convention on Rights and Duties of States, Montevideo, December 26, 1933. *Final Act of the Seventh International Conference of American States* (English version), p. 187.

⁵ It may possibly be thought that the Vatican City State should be included in this list.

It is to be noted that of the thirteen states here listed, Liechtenstein, Monaco, Nepal, San Marino, and Yemen were not invited to accede to the Treaty for the Renunciation of War of August 27, 1928.¹

(a) *States which have withdrawn from the League of Nations*

1. *Brazil.*

Brazil was named in the Annex to the Covenant as an original member of the League of Nations. The membership of the United States of Brazil resulted from the deposit at Paris of a ratification of the Treaty of Versailles, on January 10, 1920.²

On June 10, 1926, Brazil relinquished a seat on the Council.³ By a telegram⁴ dated June 13, 1926, received by the Secretary-General on June 14, 1926, the Brazilian Government gave notice of an intention to withdraw from the League. The withdrawal became effective on June 14, 1928. Since that date, however, Brazil has continued membership in the International Labour Organization, and it remains a party to the Protocol of Signature, of December 16, 1920, to which the Statute of the Permanent Court of International Justice is annexed. On May 10, 1934, it acceded to the Treaty for the Renunciation of War of August 27, 1928.

2. *Costa Rica.*

The Republic of Costa Rica applied for admission to the League of Nations in 1920. The admission was voted by the First Assembly on December 16, 1920.⁵

By a letter dated December 24, 1924, the Government of Costa Rica gave notice of an intention to withdraw from the League, the notice to take effect as from January 1, 1925.⁶ The withdrawal became effective on January 1, 1927. Abortive negotiations were conducted in 1928 with reference to Costa Rica's resumption of membership.⁷ Costa Rica has not continued its membership in the International Labour Organization, and it has not ratified the Protocol of Signature of December 16, 1920, to which the Statute of the Permanent Court of International Justice is annexed. It is listed as a state "entitled to appear before" the Permanent Court of International Justice,⁸ however. Costa Rica acceded to the Treaty for the Renunciation of War of August 27, 1928, effective as from October 1, 1929.

3. *Japan.*

Japan was named in the Annex to the Covenant as an original member of the League of Nations. Its membership resulted from Japan's being named in

¹ See U.S. Department of State Publication No. 468, entitled *Treaty for the Renunciation of War* (Washington, 1933).

² Kraus and Rödiger, *Urkunden zum Friedensvertrage*, Vol. II, p. 920.

³ *League of Nations Official Journal*, 1926, pp. 1003-7.

⁴ *League of Nations Document C.380, M.131, 1926.* The text of the telegram is also published in *Relatorio apresentado ao Presidente de Republica dos Estados Unidos do Brasil pelo Ministro de Estado das Relacoes Exteriores, May 4-December 31, 1926, Anexo A*, p. 13, but it is there given the erroneous date of July 12, 1926.

⁵ *Records of the First Assembly, Plenary*, pp. 582-4, 605-6.

⁶ *League of Nations Monthly Summary*, 1925, p. 8.

⁷ *League of Nations Official Journal*, 1928, pp. 432, 1483, 1606-8.

⁸ *Series E*, No. 10, p. 57.

the first *procès-verbal* of deposit of ratifications of the Treaty of Versailles, on January 10, 1920,¹ though the instrument of ratification was not actually deposited at Paris until March 19, 1920.²

By a telegram dated March 27, 1933, received by the Secretary-General on the same day, the Japanese Government gave notice of an intention to withdraw from the League of Nations.³ The withdrawal became effective on March 27, 1935. Japan continues to be a member of the International Labour Organization⁴ and a party to the Protocol of Signature of December 16, 1920, to which the Statute of the Permanent Court of International Justice is annexed. It is also a party to the Treaty for the Renunciation of War of August 27, 1928.

(b) *States refused Admission to the League of Nations*⁵

4. *Liechtenstein*.

The Principality of Liechtenstein applied for admission to the League of Nations, through the Swiss Minister in London, on July 15, 1920. The fifth Committee of the First Assembly reported that "this state does not appear to be in a position to carry out all the international obligations imposed by the Covenant",⁶ and the admission was refused by the First Assembly on December 17, 1920.⁷ Liechtenstein was not invited to accede to the Treaty for the Renunciation of War of August 27, 1928, but it is listed among the states "entitled to appear before" the Permanent Court of International Justice.⁸

5. *Monaco*.

The Principality of Monaco applied for admission to the League of Nations on April 6, 1920. The application was not considered by the First Assembly, though by its resolution of December 17, 1920, the First Assembly called for an examination of the question "whether and in what manner it would be possible to attach to the League of Nations sovereign states which, by reason of their small size, could not be admitted as ordinary members".⁹ A report on this question was made to the Second Assembly.¹⁰ Monaco is a party to various multipartite conventions; it was not invited to accede to the Treaty for the Renunciation of War of August 27, 1928, but it is listed among the states "entitled to appear before" the Permanent Court of International Justice.¹¹

6. *San Marino*.

The Republic of San Marino applied to the Peace Conference at Paris to be named in the Annex to the Covenant, on April 23, 1919.¹² The application is

¹ Kraus and Rödiger, *op. cit.*, Vol. II, p. 920; Appendix I, *infra*.

² (French) *Journal Officiel*, 1920, p. 4550.

³ *League of Nations Official Journal*, 1933, pp. 657-8.

⁴ *International Labour Office, Official Bulletin* (1933), Vol. XVIII, p. 266.

⁵ Admission to the League of Nations, requested in 1920 by Armenia, Azerbaidjan, Georgia, and Ukraine, was also refused. See *Records of the First Assembly, Plenary*, pp. 587-9, 633, 639-40, 651, 664-6; *ibid.*, *Committees*, Vol. II, pp. 174-5, 195-9, 218-19.

⁶ *Ibid.*, *Plenary*, p. 667.

⁷ *Ibid.*, pp. 642-3, 652. See also *Records of the Second Assembly, Plenary*, pp. 683-8.

⁸ *Series E*, No. 10, p. 57.

⁹ *Records of the First Assembly, Plenary*, p. 652.

¹⁰ *Records of the Second Assembly, Plenary*, pp. 683-8.

¹¹ *Series E*, No. 10, p. 57.

¹² *League of Nations Official Journal*, 1920, p. 264. The application was not considered by the First Assembly because San Marino had failed to furnish information requested.

mentioned in the report to the Second Assembly on the association of small states in the work of the League.¹ San Marino was not invited to accede to the Treaty for the Renunciation of War of August 27, 1928, but it is listed among the states "entitled to appear before" the Permanent Court of International Justice.²

(c) *Other states not members of the League of Nations*

7. *United States of America.*

The United States of America was named in the Annex to the Covenant as an original member of the League of Nations. It was a signatory of the Treaty of Versailles, the Treaty of St. Germain, the Treaty of Trianon, and the Treaty of Neuilly, but it has not ratified any of these treaties. On August 20, 1934, the United States became a member of the International Labour Organization.³ It is a party to the Treaty for the Renunciation of War of August 27, 1928, and because of its having been named in the Annex to the Covenant it is listed as a state to which the Permanent Court of International Justice is "open as of right".⁴

8. *Free City of Danzig.*

The Free City of Danzig is under the protection of the League of Nations, and its Constitution is under guarantee by the League. It acceded (through action by the President of Poland) to the Treaty for the Renunciation of War of August 27, 1928, the accession being effective as from September 11, 1929, and it is listed as one of the states "entitled to appear before" the Permanent Court of International Justice, "(through the intermediary of Poland)".⁵ The question of its eligibility to membership in the International Labour Organization was considered by the Permanent Court of International Justice in an advisory opinion of August 26, 1930.⁶

9. *Egypt.*

Since the termination of the British protectorate in Egypt on February 28, 1922, the Kingdom of Egypt has frequently been represented at international conferences held under the auspices of the League of Nations. It acceded to the Treaty for the Renunciation of War of August 27, 1928, and it is listed among the states "entitled to appear before" the Permanent Court of International Justice.⁷

10. *Iceland.*

The Icelandic Government addressed an inquiry to the Secretary-General-designate concerning its admission to the League of Nations, on July 2, 1919.⁸ Iceland is a party to various multipartite conventions, and it acceded to the Treaty for the Renunciation of War of August 27, 1928, effective as from July 24, 1929. It is also listed among the states "entitled to appear before" the Permanent Court of International Justice.⁹

11. *Nepal.*

Though the Kingdom of Nepal is not active in many phases of international relations, it has relations with some other states which seem to entitle it to a

¹ *Records of the Second Assembly, Plenary*, pp. 683-8.

² *Series E*, No. 10, p. 57.

⁴ *Series E*, No. 10, p. 55.

⁶ *Series B*, No. 18.

⁸ *League of Nations Official Journal*, 1920, p. 265.

³ *U.S. Treaty Series*, No. 874.

⁵ *Ibid.*, No. 10, p. 57.

⁷ *Series E*, No. 10, p. 57.

⁹ *Series E*, No. 10, p. 57.

place in this list.¹ It was not invited to accede to the Treaty for the Renunciation of War, and it is not listed among the states "entitled to appear before" the Permanent Court of International Justice.²

12. *Saudi Arabia.*

The Hedjaz was named in the Annex to the Covenant as an original member of the League of Nations. Though it was a signatory to the Treaty of Versailles, no ratification of that treaty was deposited at Paris on its behalf. In 1927 the Kingdom of the Hedjaz was united with the Kingdom of Nejd as the Kingdom of the Hedjaz and Nejd, the name of which was changed in 1932 to "the Kingdom of Saudi Arabia". It has concluded numerous bipartite treaties, and it acceded to the Treaty for the Renunciation of War of August 27, 1928, effective as from February 24, 1932. By reason of the naming of the Hedjaz in the Annex to the Covenant, Saudi Arabia is listed as a state to which the Permanent Court of International Justice is "open as of right".³

13. *Yemen.*

Though it has not played a very active role in international affairs, the Kingdom of Yemen has recently concluded treaties with Italy (September 2, 1926),⁴ the Netherlands (March 12, 1933),⁵ Great Britain (February 11, 1934),⁶ and Saudi Arabia (May 19, 1934).⁷ It was not invited to accede to the Treaty for the Renunciation of War, and it is not listed by the Permanent Court of International Justice among the states "entitled to appear before" the Court.⁸

APPENDIX I

Procès-verbal of the Deposit of Ratifications of the Treaty of Peace signed at Versailles, June 28, 1919.⁹

"En exécution des clauses finales du Traité de Paix signé à Versailles, le 28 juin 1919, les soussignés se sont réunis au Ministère des Affaires étrangères à Paris, pour procéder au dépôt des ratifications et les remettre au Gouvernement de la République française.

Les instruments des ratifications, ou notifications de leur envoi, par quatre des PRINCIPALES PUISSANCES ALLIÉES ET ASSOCIÉES, savoir:

L'Empire Britannique,

Pour le Traité de Paix, le Protocole et l'Arrangement;

La France,

Pour le Traité de Paix, le Protocole et l'Arrangement;

L'Italie,

Pour le Traité de Paix et le Protocole;

¹ A British Legation is maintained in Nepal.

² *Series E*, No. 10, p. 57.

³ *Ibid.*, p. 55.

⁴ *League of Nations Treaty Series*, Vol. LXVII, p. 383.

⁵ *Ibid.*, Vol. CXLVI, p. 359.

⁶ *British Parliamentary Papers*, Cmd. 4752.

⁷ *La Documentation Internationale* (1934), Vol. I, p. 76.

⁸ *Series E*, No. 10, p. 57.

⁹ Text as printed for the French Ministère des Affaires Étrangères, 1920.

Le Japon,

Pour le Traité de Paix et le Protocole (l'instrument sera remis ultérieurement);

Et par les autres PUISSANCES ALLIÉES ET ASSOCIÉES ci-après, savoir:

La Belgique,

Pour le Traité de Paix, le Protocole et l'Arrangement;

La Bolivie,

Pour le Traité de Paix et le Protocole (l'instrument sera remis ultérieurement);

Le Brésil,

Pour le Traité de Paix et le Protocole;

Le Guatemala,

Pour le Traité de Paix et le Protocole;

Le Pérou,

Pour le Traité de Paix et le Protocole (l'instrument sera remis ultérieurement);

La Pologne,

Pour le Traité de Paix et le Protocole;

Le Siam,

Pour le Traité de Paix et le Protocole;

La Tchéco-Slovaquie,

Pour le Traité de Paix et le Protocole;

L'Uruguay,

Pour le Traité de Paix et le Protocole;

Ainsi que par l'Allemagne,

Pour le Traité de Paix, le Protocole et l'Arrangement;

ont été produits et ayant été, après examen, trouvés en bonne et due forme, sont confiés au Gouvernement de la République française pour rester déposés dans ses archives.

Conformément aux dispositions des clauses finales précitées, le Gouvernement français donnera avis aux Puissances contractantes des dépôts des Instruments des Ratifications ultérieurement effectuées par les États qui sont signataires desdits Traité, Protocole et Arrangement et qui n'ont pas été en mesure de procéder dès aujourd'hui à cette formalité.

EN FOI DE QUOI, les soussignés ont dressé le présent procès-verbal et y ont apposé leurs cachets.

Fait à Paris, le dix janvier 1920, à seize heures quinze minutes.

D. Lloyd George

G. Clemenceau

F. Nitti

K. Matsui

Hymans

Jose C. Arteaga

Raul Fernandes

Guillermo Matos Pacheco

F. Garcia Calderon

St. Patek

Charoon

Stefan Osusky

J. A. Buero

v. Simson

Freiherr von Lersner

APPENDIX II

*His Britannic Majesty's Ratification of the Treaty of Peace signed at Versailles,
June 28, 1919.*¹

GEORGE, BY THE GRACE OF GOD, OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEAS KING, DEFENDER OF THE FAITH, EMPEROR OF INDIA, &C., &C., &C., TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING!

WHEREAS a Treaty between Us and the Powers and States therein specified, providing for the termination of the state of war existing between the Allied and Associated Powers on the one part and the German Empire on the other part, was concluded and signed at Versailles on the twenty-eighth day of June, in the year of Our Lord One Thousand Nine Hundred and Nineteen, by the Plenipotentiaries of Us and of the aforesaid Powers and States duly and respectively authorized for that purpose, together with a Protocol indicating the conditions in which certain provisions of the Treaty are to be carried out, which Treaty and Protocol are, word for word, as follows:—

[text omitted]

And whereas a Treaty was also concluded and signed at the same time and place between Us and the other Principal Allied and Associated Powers on the one hand and Poland on the other hand, providing for the recognition of Poland as an independent and Sovereign State, which Treaty is, word for word, as follows:—

[text omitted]

And whereas an Agreement between Our Plenipotentiaries and those of the Governments of the United States of America, Belgium, and France of the one part and the Plenipotentiaries of the Government of Germany of the other part, regarding the military occupation of the territories of the Rhine, was also concluded and signed at Versailles on the date afore-mentioned, which Agreement is, word for word, as follows:—

[text omitted]

WE, having seen and considered the Treaties, Protocol, and Agreement aforesaid have approved, accepted, and confirmed the same in all and every one of their Articles and Clauses, as We do by these Presents approve, accept, confirm, and ratify them for Ourselves, Our Heirs and Successors; engaging and promising upon Our Royal Word that We will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Treaties, Protocol, and Agreement aforesaid, and that We will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in Our power. For the greater testimony and validity of all which, We have caused Our Great Seal to be affixed to these Presents, which We have signed with Our Royal Hand.

GIVEN at Our Court of Saint James, the eighth day of October, in the year of Our Lord One Thousand Nine Hundred and Nineteen, and in the Tenth year of Our Reign.

[signature omitted]

¹ Deposited at Paris, January 10, 1920.

NOTES

TERMINATION OF MEMBERSHIP OF THE LEAGUE OF NATIONS

SEVERAL states have recently given notice of their intention to terminate their membership of the League of Nations. Among these states are Germany, Japan, and Paraguay. It has been generally assumed that under the terms of paragraph 3 of Article I of the Covenant of the League of Nations the membership of such states will automatically be ended after the expiration of the two years' notice for which the paragraph provides, and that in consequence after this two years' notice the resigning states will be free from all obligations towards the League.

Statesmen have made numerous declarations, and eminent publicists have written numerous articles, in which this assumption is tacitly or specifically accepted. The resigning states themselves have acted as though it was in no way open to doubt; thus they have made arrangements to pay their subscriptions to the League for the period of their two years' notice, but then to terminate these subscriptions. The Assembly of the League, in drawing up the budget for 1935, allowed for the cessation of these subscriptions, and thus also tacitly accepted the assumption.

From the legal point of view, however, it is at least doubtful whether, under the terms of paragraph 3 of Article I of the Covenant, the membership of all the resigning states can be held to end automatically as soon as the period of their two years' notice has expired. Paragraph 3 of Article I reads as follows:

"Any member of the League may, after two years' notice of its intention so to do, withdraw from the League, *provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.*"

It is quite plain from this language that no member of the League of Nations can legally terminate its membership unless "*all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal*". It must be particularly noted that a distinction is made between obligations under the Covenant and other international obligations. It is clear, therefore, that a state which has violated its international obligations, whether under the Covenant or under other international contracts which it has made, cannot end its membership until its violation has ceased.

If this language is interpreted strictly, it would appear that none of the three states mentioned—Germany, Japan, and Paraguay—can be held to be in a position legally to end its membership of the League.

Germany, by its recent note to the British Government, referred to the existence of a German Air Force, and thus has made a public admission of her violation of the Disarmament clauses of Part V of the Treaty of Versailles.

Japan was condemned by the resolution of the Assembly adopted on February 23, 1933, as an aggressor state which had violated its obligations under the Covenant.

Paraguay, by a recent decision of the Council of the League, has been condemned as an aggressor who has violated its obligations under the Covenant, and in virtue of this condemnation the embargo on arms to Bolivia was raised, while that on arms to Paraguay was maintained.

None of these states, therefore, can claim that "all its international obligations and all its obligations under this Covenant . . . have been fulfilled". It would seem to follow that no one of them can make its withdrawal legally effective.

Germany no doubt can plead—as indeed she has already pleaded in official documents—that Part V of the Treaty of Versailles has ceased to have any binding force because the other signatory states have failed to fulfil the condition of general Disarmament for which the Preamble to Part V provides. The British Government has officially rejected this argument, but it cannot be denied that, in addition to its political cogency, it has a certain legal force.

Japan and Paraguay, however, have no such argument in their support, and in respect of them the point now under discussion is the more important, because paragraph 3 of Article I was clearly drafted with the express purpose of preventing what they are now attempting to do. The underlined words in paragraph 3 of Article I indeed are meaningless, unless their purpose is to prevent states committing aggression and then endeavouring to free themselves from the obligations and restrictions which the Covenant imposes.

If the above argument is accepted, it will no doubt be asked what the other members of the League can do to give effect to the intention of the Covenant. Will these other members not be practically helpless if the withdrawing states refuse to send their delegates to the Council and the Assembly of the League, and in other ways cease active exercise of their rights of membership?

The question is more political than legal, and from the political point of view some authorities no doubt would argue that any action which the other members of the League might take would probably do more harm than good. There are, however, at least two measures which it is possible for the members of the League to take, if they so desire.

First, they could make it plain to the withdrawing states and to the world at large, perhaps by a Resolution at the next Assembly, that they do not consider that the withdrawing states have legally freed themselves from the obligations which the Covenant involves.

Second, in drawing up the League budget they could continue to make nominal provision for contributions from the states in question. (This in fact was done for many years in respect of the Argentine, although the Argentinian Government abstained from all participation in the proceedings of the League.)

P. J. N. B.

THE exact meaning of Article 1 (3) of the Covenant is admittedly difficult to ascertain. The conclusion reached—on a literal interpretation of the words used—in the immediately preceding note is rather startling. One of its consequences is that no member of the League can leave it because no member has fulfilled all its obligations under the Covenant because all have failed to fulfil their obligations under Article 10 of the Covenant to preserve the territorial integrity of China.

Sir J. Fischer Williams¹ relates that:

"When President Wilson was discussing this provision with some U.S. senators in August 1919, he told Senator Borah that the Council of the League had nothing to say about the question whether a nation had fulfilled its international obligations. The withdrawing country itself would be the sole judge of whether it had fulfilled its obligations under the League Covenant. The Council could take no action . . ."

¹ *Some Aspects of the Covenant of the League of Nations*, p. 54.

M. Ray¹ emphasizes the difficulty of interpreting this paragraph of the Covenant. He states that the real object of the provision was to prevent a state from contending that by ceasing to be a member it escaped the consequences of obligations already accrued during membership.

The preceding note suggests that the Assembly should declare that the withdrawals of Japan, Paraguay, and Germany are legally invalid because given by members who had not fulfilled their obligations under the Covenant. President Wilson in 1919 said this was not a question which the Council could consider—and presumably he would have said the same about the Assembly.

These countries of course maintain—rightly or wrongly—that they have not broken the Covenant and two of them advance the misapplication of the Covenant by the other members as a ground for their withdrawal.

X.

EXPULSION FROM THE LEAGUE OF NATIONS

IN view of the suggestions which are made from time to time that for one reason or another some member of the League of Nations should be expelled therefrom, it may be of interest to consider the origin and scope of the provision for expulsion which appears in the Covenant. Article 16 (4) of the Covenant provides that—

“Any member of the League which has violated any covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the Representatives of all the other members of the League.”

This provision is sometimes referred to as though expulsion were a sanction comparable with, and even alternative to, the other provisions of Article 16.² A brief account of its origin will show that the draftsmen of the Covenant appear to have taken a different view.

There was no provision for expulsion from the League in any of the earlier drafts of what is now the Covenant. The Italian proposals, which were placed upon the table of the League of Nations Commission at one of its early meetings but never taken by it as a basis for discussion, did include a provision for expulsion from the League as one of the sanctions to be applied against states violating their covenants,³ but no other draft included a provision of that nature and the provision for expulsion was not inserted in the Covenant until a very late stage of the proceedings. The records of the preliminary discussions between the British and American delegations, which took place before the League of Nations Commission met and formed the basis of its work, show that the minds of the leading architects of the Covenant were running in exactly the opposite direction. The status which they contemplated as appropriate for a state which had violated its covenants was not that of a state expelled from the League and thereby released from all future obligations under the Covenant, but that of a state subjected to an exceptional degree of international control. General Smuts, in his well-known pamphlet *The League of Nations: A Practical Suggestion*, suggested that the Covenant should include a provision that any state violating it should, after

¹ *Commentaire du Pacte*, p. 111.

² e.g. Fischer Williams, *Some Aspects of the Covenant of the League of Nations*, at pp. 153–4.

³ Miller, *The Drafting of the Covenant*, Vol. II, p. 253, Article 29 (1).

subjugation, be made subject to specially restrictive conditions; and should have imposed upon it the measure of disarmament contemplated in 1919 for the ex-Central Powers and also the general system of control over foreign policy which General Smuts wished to see established for the new states of Central Europe.¹ This suggestion was included by President Wilson in all three of his Paris drafts of the Covenant,² but was not included in the draft submitted to the League of Nations Commission. A similar suggestion was made at one stage from British quarters, and the British plan of January 20 included a provision that

"... as part of the terms of peace imposed upon the state which has violated the provisions of Article 1, it shall be called upon to restore all contracts existing at the date of the outbreak of hostilities between their nationals and the nationals of the enemy state which their nationals wish to maintain, and also to provide without reciprocity security for the payment of all debts owing at that date to nationals of the co-operating states members of the League".³

The notion was not that the appropriate way in which to deal with the covenant-breaking state was to expel it from the League of Nations, but that the proper way to deal with covenant-breakers was to attempt to subject them to more rigorous international control. These provisions disappeared from the draft Covenant before it was submitted to the League of Nations Commission. It is unnecessary, even were evidence on the point available to the writer of this note (which it is not), to inquire why. It may have been because the difficulty of establishing any general control of the policy of new states had by that time been realized. It may have been because it was felt that in the early stages of the League of Nations' history it would be impracticable to give effect to so ambitious a plan. Whatever the motive for the deletion of the above suggestions, they do at least indicate what was thought at that time to be the most appropriate method of treating the problem.

How then did the provision for expulsion, the direct antithesis of the above suggestions, come into the Covenant? It was introduced at a very late stage by the Final Drafting Committee, and were it not that Mr. Hunter Miller has published in his *Drafting of the Covenant* a note circulated to the members of the League of Nations Commission by the British delegation at that time, we should still not know why. This note comments upon the provision as follows:

"A new final paragraph has been inserted to meet the case of a state which after breaking its covenant still claims to vote on the Council or in the Assembly."⁴

These words throw a flood of light upon the matter. Some provision for expulsion is obviously thought a necessary corollary to the unanimity rule. The clause was introduced into Article 16 not because it was thought that the appropriate method of dealing with a covenant-breaking state is to expel it from the League of Nations and thereby to confess the complete inability of the League to restrain illegal conduct, but because it was thought that a state in breach of covenant might attempt to block systematically all League business by voting against every proposal under consideration.

It is not the purpose of this note to contend that the powers of the Council under Article 16 (4) of the Covenant are as limited as the intention which inspired that clause. It would seem impossible to deny that the text adopted empowers

¹ Smuts, *op. cit.*, pp. 62-3, reprinted in Miller, *op. cit.*, Vol. II, pp. 55-6.

² *Ibid.*, Vol. II, pp. 80, 101, and 149.

³ *Ibid.*, Vol. II, p. 113, Article 15.

⁴ *Ibid.*, Vol. I, p. 417.

the Council to expel any member "which has violated any covenant of the League". The origin of the clause is nevertheless of great interest from at least two points of view. It may well become one of the constitutional traditions of the League never to have recourse to the clause except in the type of case for which it was originally intended. It was Maitland who wrote that "a ready recourse to outlawry is, we are told, one of the tests by which the relative barbarousness of various bodies of ancient law may be measured",¹ and a weapon which was at best clumsy, even in societies the units of which were individuals, is quite incapable of achieving any lasting result in a community the units of which are states and one of the characteristics of which is therefore a very low rate of mortality. In the second place, the origin of the clause may be a relevant consideration if it is ever necessary to determine the legal effect of expulsion. The problem of the legal effect of loss of membership of the League is one of singular complexity owing to the variety of cases in which League members assume obligations, many of them involving varying types of legal relationship with the League or some League organ or associated institution, under instruments distinct from the Covenant. Difficult questions would arise as to the effect of expulsion upon obligations and relationships of this kind, and in the first case of expulsion, should there ever be one, there will be neither texts nor precedents which give an unequivocal answer. It will therefore be necessary to consider these questions on the basis of general principles. If expulsion is looked upon as a process of outlawry it will be natural to regard it as snapping all legal ties with the League. If the provision for expulsion is considered, in view of its origin, as being no more than a precautionary clause intended to enable the League to protect itself against obstruction by a covenant-breaking state, it will be natural to construe somewhat differently the legal consequences of expulsion. Certain obligations accepted by states as members of the League may be regarded as remaining in force even in respect of an expelled state, particularly in cases in which such obligations arise under instruments creating institutions the proceedings of which cannot be blocked by the veto of any one state.

C. W. JENKS.

THE BINDING FORCE OF LEAGUE RESOLUTIONS

THE question has recently been raised whether Great Britain is legally bound by her participation in the well-known resolution of the League Assembly (March 11, 1932) which embodied the so-called "Stimson doctrine" of the non-recognition of new international situations created by illegal means. The importance of the issue thus raised obviously extends far beyond the particular case with which the League was then concerned. If all the participating states are bound in law by the resolution, the result is that in effect the Assembly can change international law by its resolutions. That the resolution in question is at variance with established law is beyond dispute, for it is unquestionable that under the accepted law every state can concede or withhold recognition at its sole discretion. In other words the resolution, if it is binding, deprives all the participating states of a right which they previously enjoyed under the law of nations. If this can be done in one instance it can be done again in others, and the whole realm of international law is brought under the empire of the Assembly, which can at any moment

¹ Pollock and Maitland, *History of English Law*, 2nd ed. Vol. II, p. 450.

introduce the most subversive changes by unanimous resolution. In order to determine whether this immense legislative power has actually been granted, we must turn to the text of the Covenant.

In the preamble to the Covenant we find it laid down that the League is pledged to "the firm establishment of international law as the actual rule of conduct among governments". Clearly this must mean the existing law, and we may further agree that nowhere in the text is the power to change the law of nations conferred by any explicit words. Can we find it in the more general phraseology of certain articles? In Article 3 we are told that "the Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world", and the same power is given to the Council by Article 4. The draftsmanship leaves much to be desired, but the words presumably mean that a matter which is otherwise not within the competence of the League may be dealt with if there is an immediate danger to peace. Again in Article 11 we find that "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations", but this power is only granted in the event of "war or threat of war". There is no other article which seems to have any bearing on the matter under discussion. If the power that is now claimed exists at all, it must be found under the vague general words of Article 3.

In default of authority we must apply common-sense principles of interpretation. Guided by this test, the *prima facie* meaning of the words in Article 3 is that they confer an emergency power, enabling the League to deal with unforeseen crises not covered by the specific enumeration of its functions in Articles 8-25. Normally it can only deal with matters that lie "within the sphere of action of the League", and the wider powers are evidently only to be exercised in abnormal and unforeseen emergencies. If the words which follow the word "or" were deemed to confer a general legislative power, the words which precede "or" would be superfluous.

Practical considerations reinforce this argument. The task of introducing changes into the accepted law of nations is one of the greatest difficulty and complexity, both political and technical. Hitherto it has always been attempted by the method of special conferences, to which the participating states send expert delegates, armed with full powers precisely defining the scope of their functions. The meeting of the conference is preceded by prolonged and expert study of the subject in each of the participating countries. Every article of the proposed text is minutely scrutinized, line by line and word by word, from every possible angle. If a convention is at last drawn up, it is signed subject to ratification, which is only given after further detailed study in each country concerned.

If permanent changes in the law of nations could be introduced by resolutions of the League Assembly, all these safeguards would disappear. There is no preliminary expert study, and the credentials of the delegates do not explicitly define the scope of their deliberations. The delegates themselves are not usually experts and the resolution is reached after a short general debate in which the dominating interest is the political merits of some current controversy. The decision itself is not subject to ratification, so that there is no opportunity for further study of its implications. It is difficult to imagine any law-making procedure better calculated to produce bad results, and time will probably show that the resolution which purports to consecrate the "Stimson doctrine" is quite impossible as a statement of permanent law. Every legal system must possess some means of

converting illegality into legality. In municipal law this is done by means of statutes of prescription or limitation, and in the law of nations the accepted doctrine of recognition is a device for achieving the same result. Unless other states are prepared to take some active steps for restoring the original legal situation, a time must come when they are compelled to recognize the existing facts. *Quod fieri non debet, factum valet.*

One more point may be mentioned. If such resolutions were binding as permanent changes in the law, it would follow that they could not be amended or repealed except by the same process of unanimity. The result then would be that every state, however insignificant, would have a legal veto on the action of the rest of the members of the League. Fifty states might decide that the time had come to recognize a given change in the map of the world, but the smallest Caribbean republic could tell them that their action would be illegal without its consent.¹ It goes without saying that the world would never tolerate such an absurdity, and the law, if it were law, would be amended by the simple process of breaking it. But international law is not yet so strong that its best friends will wish to subject it to any unnecessary strains.

From the point of view of Great Britain there are cogent constitutional objections to the theory that League resolutions are international obligations binding the Crown, but these are too obvious to need emphasis. Similar difficulties would arise in other states where the treaty-making power is subject to constitutional restrictions. If every delegate to the Assembly could impose permanent obligations upon his country by voting for a resolution, it is obvious that the precaution with which constitutional law safeguards the treaty-making power would in many cases disappear, and many countries would find that by joining the League they had unwittingly altered their own fundamental laws.

In a word the Covenant must be interpreted reasonably, and we have no ground for assuming that the member states invested the League with any other jurisdiction than that which is to be found explicitly or by necessary implication in the agreed text. If they had intended to confer upon the League a general competence to change the law of nations, we may reasonably assume that this power would have been granted by explicit words, and that its exercise would have been controlled by the safeguards which experience has shown to be necessary.

H. A. S.

THE MEANING AND LEGAL EFFECT OF THE RESOLUTION OF THE LEAGUE ASSEMBLY OF MARCH 11, 1932

ON March 11, 1932, the Assembly of the League, in the course of its consideration of the Sino-Japanese dispute, adopted a resolution of which the operative part declared "that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris". Quoted in this way out of their context the words take on a generality which they can hardly bear if the whole Resolution is looked at; the recitals which precede these words relate explicitly to "the present dispute", and when

¹ The reader may recall the Cuban obstruction to the amendment of the Statute of the Permanent Court.

read as a whole, the Resolution does not seem to amount to an acceptance of the "Stimson" doctrine of non-recognition as a general principle, but only to its application *pro hac vice* in the pending dispute. Such a Resolution seems to be clearly within the competence of the Assembly under Article 3 of the Covenant.

The Report on the same dispute subsequently adopted by the Assembly under Article 15 (4), on February 24, 1933, states that "the Members of the League intend to abstain, particularly as regards the existing régime in Manchuria, from any act which might prejudice or delay the carrying out of the recommendations of the said Report. They will continue not to recognize this régime either *de jure* or *de facto*." The two passages appear to have the same ambit; the later is explicitly particular in its reference to the Sino-Japanese dispute, but the generality of the earlier one seems to be only verbal.

Whether the Resolution of March 11, 1932, ought to be read as a *general* acceptance of the Stimson doctrine or only as a decision to apply it in a particular dispute, though politically a matter of importance, is, perhaps, not directly relevant to an analysis of its juridical effect. On that question the governing consideration seems to be that the Covenant confers no general authority on the League or on any of its organs to take action which will have the effect of creating obligations legally binding on its members; there are only certain exceptional cases in which League action has this legal effect, and they are express. No doubt the Assembly has more than once drawn up and opened for signature (subject to ratification) treaties, but on such occasions it has never, so far as I know, been suggested that a resolution of the Assembly should replace any of the accepted formalities of treaty-making; in substance the members of the League seem merely to have used the machinery of the Assembly, for the sake of convenience, instead of a specially summoned treaty-making conference, and to have retained the usual safeguards. In the present case the Assembly did not even purport to be acting in this way.

The juridical analysis of an ordinary resolution of the Assembly is surely a simple matter. It is not a legislative act; it does not constitute a treaty between the members; it is a *Vereinbarung*, a concordant declaration of wills, and not a *Vertrag*. From the point of view of the individual member joining in it, its significance is that the member, through its delegates, has made a formal declaration of intention or policy. Such a declaration is not immutable, but it is certainly not lightly to be departed from, and ordinary decency requires that it should not be departed from without notice to, and consultation with, the other concurring members.

J. L. BRIERLY.

THE MANDATED TERRITORY OF SOUTH-WEST AFRICA

Two interesting problems which confronted the Mandatory of South-West Africa were the subject of a note by the writer in the last volume of this Year-Book. As those problems were the subject of special comment by the Permanent Mandates Commission at its Twenty-Sixth Session it would appear appropriate to trace their development during the past twelve months. The two problems were first, the spread of Nazi-ism in the territory, and second, the future form of administration.

In regard to the former the position at the beginning of 1934 was that the

progress of the Nazi movement amongst inhabitants of German nationality or origin had had two consequences. In the first place the South-West Legislative Assembly had passed the Criminal Law Amendment Ordinance empowering the Administrator and Executive Committee to suppress any organization which in their opinion would be detrimental to the interests of the Territory. This Ordinance had been approved and promulgated by the Mandatory, the Union Government. In the second place the German members of the executive and legislative bodies had decided upon a policy of non-co-operation in the government of the Territory. The Nazi movement was spreading in three ways. The German political organization, the Deutsche Bund (originally a cultural association), adopted the "Führer" principle, but although avowedly aiming at the establishment of a purely German racial bloc it remained an independent body with its attention directed strictly to the well-being of the Territory. Alongside the Bund grew up two other organizations, the Hitler-Jugend-Bewegung and the National-Sozialistische Deutsche Arbeiter Partei. The former, although ostensibly a kind of boy-scout movement, was undoubtedly intended to promote Hitlerite doctrines in the Territory. It became the subject of the first application of the Ordinance in July, when its activities were declared illegal by Proclamation and its leader, Captain von Lossnitzer, was ordered to leave the Territory. The latter organization, the N.S.D.A.P., was even more clearly directed from outside the Territory and responsible for a tremendous growth in German national-socialistic propaganda. It survived however until October, when, after police raids on its headquarters and branch offices, it was declared to be detrimental in its activities to the "peace, order, and good government of the Territory". The suppression of these two organizations has produced at least one satisfactory result. Whilst the Deutsche Bund still retains its "Führer" principle and Nazi methods, the policy of non-co-operation has now been abandoned. At the recent elections the Bund directed all Germans to give their support to a Pact Party constituted by an alliance between the Economic League and the Deutsche Bund, and three members of the Bund and one Economic League member were subsequently elected.

In regard to the second problem, the future form of the administration of the Territory, the issue now placed before the Mandatory is a difficult but clear-cut one. By the requisite two-thirds majority (the Bund members voting in the minority) the South-West Assembly in November passed the motion—"That the Territory be administered as a fifth province of the Union or otherwise as an integral portion of the Union subject to the provisions of the Mandate". The problem therefore facing the Mandatory is the incorporation or otherwise of the mandated territory. It is reassuring that there seems to be no likelihood of precipitate action on the part of the Mandatory resulting in the Permanent Mandates Commission being faced with a *fait accompli*. Still more reassuring was the explanation by the Administrator to the South-West Assembly that the Union Government would have nothing to do with any proposal, no matter how it was camouflaged, which amounted to veiled annexation, or which violated in any way the trust placed in the Union as Mandatory. It would hardly seem equitable to give effect to a resolution emanating from a section of the white inhabitants of the Territory without a full exploration of its repercussions on the real subject of the mandate—the native population.

E.

PRINCIPLES OF INTERPRETATION BY THE PERMANENT COURT

It is worth while to call attention to what appears to be a novelty in the formulation by the Council of the League of a request for an Advisory Opinion of the Permanent Court of International Justice. In the dispute between Greece and Albania on the question whether certain action taken by Albania was in conformity with the Declaration as to the treatment of minorities made by that country on her admission to the League in 1921, the request of the Council for an Advisory Opinion asked "whether, regard being had to the above-mentioned Declaration of October 2, 1931, *as a whole*, the Albanian Government is justified in its plea that, as the abolition of the private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with *the letter and spirit* of the stipulations laid down in Article 5, first paragraph, of that Declaration".

If it be right to assume that the question for the opinion of the Court was whether on the true interpretation of the Declaration Albania had or had not acted in contravention of her engagements to the League, it is submitted that the words in italics, which have a tendency to prescribe to the Court the principles on which the Declaration is to be interpreted, are superfluous. Even if the words last italicized were taken to refer only to the Albanian contention before the Council, this is not applicable to the earlier words italicized; and if the reference be to the Albanian contention before the Council, it would be unfortunate that opinions of the Court should be limited to a decision on the validity of the contentions formulated before the Council, and should not extend to the whole matter at issue—that is, in this particular case, the extent under the Declaration of 1921 of Albania's obligations as to schools for minorities. Albania in her argument before the Court was surely not bound to limit herself to the arguments used before the Council.

It need not be emphasized how important it is that the Council should not have the air of suggesting what principles of interpretation for an international document should be accepted by the Court. A search through all the requests for Advisory Opinions in the Court's history has not revealed any case in which a suggestion of this nature has previously been conveyed.

'O'.

THE CHINN CASE

THE proceedings in the *Oscar Chinn* case in the Permanent Court of International Justice (*Publications of the P.C.I.J.*, Series A/B, No. 63) raise one or two issues which are of even greater importance than the actual decision. The case as presented to the court by Counsel for the litigating parties—the United Kingdom and Belgium—related to a difference of opinion on the point whether certain obligations of the Belgian Government under the Convention of St. Germain of 1919 had or had not been observed. Both the written and the oral arguments proceed upon the basis of the validity of that convention; both the litigating Governments were in fact parties to it. But in two of the dissentient opinions—those of Judges van Eysinga and Schücking—a wholly different point is discussed and (so far as these opinions are concerned) determined, namely whether the Convention of St. Germain was not wholly void even as between its signatories, on the ground that it modifies the General (Berlin) Act of 1885 without the assent of all the parties to that Act.

This event may be looked at from two points of view: (1) as a matter of the procedure of the Court, and (2) as to the substance of the opinions given.

(1) As a matter of procedure, it may be suggested with very great respect to the two eminent judges directly concerned, that when a fundamental point of this nature occurs to a member of the Court, it would be desirable that he should bring the matter to the notice of the Counsel engaged, by oral comment during the proceedings. Otherwise there is a grave risk that a case may be decided on a point which has never been argued; in fact it *will* be so decided if the member or members of the Court to whom the point occurs convince their colleagues that the point is sound. It is unnecessary to insist how serious to the usefulness of the Court the consequences might be. States, as things stand, with certain limited exceptions, are not bound to submit their legal differences to the Court. Perhaps the answer is that if there is any disposition on the part of the majority of the Court to decide a case on a point not argued, the Court will raise the point and direct a re-hearing. But nevertheless if the practice exemplified in the Oscar Chinn case is maintained, eminent members of the Court put on record views which are entitled to very high respect if only as dicta, without any submission to the Court of the relative points by the litigating states, and without argument.

(2) As to the substance of the opinions intimated, space is not available for adequate discussion here. But a word or two may be allowed: Judge van Eysinga tells us that "The General Act of Berlin does not create a number of contractual relations between a number of states, relations which may be replaced as regard some of these states by other contractual relations: it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required" (*ubi supra*, pp. 133, 134).

The writer finds it difficult to follow this argument. If the General Act of Berlin is something more than a contract, how comes it that it is modifiable "by the *agreement* of all *contracting* Powers"? To the extent to which (if at all) the General Act or any other international instrument goes beyond the institution of contractual relations between the parties to the instrument, its work can, it is suggested, be undone, if at all, only with the assent of those *personae* of international law who have rights under the new "constitution" set up—who may or may not be parties to the original contract. But is there really any authority for interpreting any multilateral treaty on other principles than those of contract, and, if the answer is in the affirmative, where are those other principles to be found? If we are to talk in quasi-metaphors and call the Act or multilateral treaty "legislation", the analogy with municipal legislation would clearly suggest that the law can be modified with something less than the unanimity of all the original legislators.

If, on the other hand, an Act or multilateral treaty consists merely of contractual relations, on what principle can it be held that a contract between, let us say, all the letters of the alphabet cannot be modified as between all letters from A to Y without the assent of Z, who perhaps has only the remotest practical interest and may be inclined to put a price on what on this theory is the all-important release of an arbitrary veto? (Z's rights cannot be modified without Z's assent, but that is a distinct point.) It is true that if the hypothetical non-assenting Z is in fact an important state or group of states which ought as a matter of equity and good feeling, not to say "common decency", to have been consulted when

the original contract was replaced by new contractual arrangements, it is difficult to refuse sympathy to Z, but this is a consideration which is not relevant when the point to be decided relates to the relations, under the new contract, between A and B. Surely A and B can, if they choose, waive their rights to claim this or that treatment for their nationals, or indeed any other of their own rights under a multilateral convention, and if they do so is not their waiver as between themselves binding?

If the intention is to take a slightly different line and to give effect in international relations and international law to conceptions of international public order or public policy which would curtail the freedom of states to revise by contract rights of which contract has been the foundation, it would be impertinent to insist on the necessity of proceeding with extreme caution. 'O'.

This note refers to the same question as is discussed in the preceding note in connexion with the Dissenting Opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case. It is therefore convenient to omit a statement of the facts which gave rise to the observations of these two judges. The question is, whether two or more parties to a multilateral treaty are legally in a position to modify *inter se* or in treaties concluded with third states the position established by the terms of the original treaty in a manner which does not directly and on the face of it conflict with the rights acquired by the other signatories of the multilateral treaty. (It is, of course, clear that if the new treaty infringes directly and patently the rights of the other signatories¹ it is contrary to law.)² The Covenant of the League apparently refers to situations of this nature by laying down, in Article 20, that members of the League "solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof". The consequences of a failure to comply with this obligation are not clear; they are not beyond doubt even in the case of Article 18, which provides expressly that treaties not registered in conformity with that article shall not "be binding until so registered".³ What would, for instance, be the effect of an agreement between two members of the League waiving the right to invoke the consequences of non-registration of any particular treaty?

The position is even more difficult in multilateral treaties containing no provisions analogous to Article 20—provisions, that is to say, calculated to safeguard the general purpose of the treaty as distinguished from the particular interests of the parties. Some hypothetical cases may be mentioned by way of example: Can two or more signatories of the General Treaty for the Renunciation

¹ The judgments of the Central American Court of Justice in 1916 and 1917 in connexion with the Bryan-Chamorro Treaty (*American Journal of International Law*, Vol. XI (1917), pp. 181-229 and 674-730) and the Advisory Opinion of the Permanent Court of International Justice in the *Austro-German Customs Union* case (Series A/B, No. 41) afford illustrating examples of judicial treatment of questions of this nature. See on this aspect of the question an admirable article by Rousseau in the *Revue générale de Droit international public*, Vol. XXXIX (1932), pp. 133-92, entitled "De la compatibilité des normes juridiques contradictoires dans l'ordre international".

² The effect of such illegality of the new treaty may be a matter of dispute. See a discussion of this point by Sir John Fischer Williams in *Transactions of the Grotius Society*, Vol. XVIII (1933), pp. 119-21, in connexion with the new doctrine of non-recognition.

³ The matter is discussed in Anzilotti, *Cours de droit international* (French transl., 1929), pp. 374-92, and by McNair in Oppenheim, Vol. I (4th ed., 1928), § 518a.

of War, faced with a final failure of all means of pacific settlement, lawfully agree to settle a particular dispute by resort to war?—"lawfully" meaning "without disregarding the rights of the other contracting parties".¹ Can two or more signatories of the Barcelona Convention and Statute of 1921 on the Régime of Navigable Waterways of International Concern agree, for reasons which they find compelling, that they will mutually subject the nationals of the states parties to the new treaty to dues and charges other or higher than those levied upon the subjects of the other contracting parties of the Barcelona Convention? Can two or more parties to a multilateral convention exempting aliens from the duty to deposit security for costs when appearing as plaintiffs agree to abrogate that provision, *inter se*, wholly or in part? Can two states, parties to a multilateral treaty providing for equality for national and foreign workers as regards workmen's compensation for accidents, subsequently agree to adopt a different method in their reciprocal relations?

It would be easy to multiply these questions by reference to most of the multilateral conventions. They have been framed so as to show the diversity of possible situations and the difficulty of suggesting a solution equally applicable to all of them. Their common feature is that, on the face of it, no interests are directly involved except those of the signatories of the new treaty. Nevertheless it is clear that in some of these cases the rights of other signatories of the original multilateral treaty may be deeply, although indirectly, affected. The signatories of the original convention may have a general legal interest in the abolition of war as an instrument of national policy, or in the maintenance of the principles of the freedom of navigation on international rivers, or of easy access to courts, or of certain standards for the international protection of workers. States conclude multilateral treaties not only in order to secure for themselves concrete mutual advantages in the form of a tangible give and take, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations the uniformity and general observance of which are of the essence of the agreement. The interdependence of international relations frequently results in states having a vital interest in the maintenance of certain rules and principles, although a modification or breach of these principles in any particular single case is not likely to affect adversely some of them at all or at least not in the same degree. The Aaland Islands controversy illustrated the fact of the existence of treaties which contain provisions transcending the interests of the parties directly concerned. Judge Anzilotti, in his opinion in the case of the Austro-German Customs Union, apparently had in view a similar contingency when he questioned whether the states parties to the Geneva Protocol of 1922 were in a position to modify in that Protocol the provisions of Article 88 of the Treaty of St. Germain, which "form an essential part of the peace settlement, and were adopted not in the interest of any given state but in the higher interest of the European political system and with a view to the maintenance of peace".²

It is submitted that it is possible to approach this subject without placing too much reliance upon the distinction between law-making and other treaties—a distinction the scientific value of which is highly controversial. Neither is it necessary, for this purpose, to establish a hierarchy of treaties and to regard some of them as being of a higher, legislative value. No such distinction has so

¹ It is common ground that such rights are violated if one signatory attacks the other by resorting to war.

² Series A/B, No. 41, p. 64.

far been established by positive international law. Although there has been an increased tendency to use the term "international legislation", such terminology, when used with reference to existing multilateral treaties of a general character, is purely metaphorical and likely to conceal the fact that an international legislature, however desirable it may be, does not as yet exist. The problem is simply how far international law recognizes a general interest of the signatories in the maintenance of a treaty regardless of the question whether any particular or individual interest is directly and immediately involved. That it does and ought to recognize such interests there is no doubt. The immediate interests of a state are not necessarily the most important or enduring. On the other hand, an attitude of rigid adherence to a purely formal immutability of the law is hardly entitled to respect. It is clearly impossible to accept the view that the provisions of a multilateral treaty can never be modified and its obligations limited by particular agreements unless with the consent of all other contracting parties. It is equally difficult to acquiesce in the opinion that the stipulations of a multilateral treaty can always be modified at will by particular agreements provided that in their terms they are limited to the new contracting parties. In the absence of express treaty provisions bearing on the matter, the approach must, it is submitted, be a pragmatic one. We ought to proceed from the assumption that the interest of the original signatories in the maintenance of the régime established by the treaty may be either direct or indirect, and that both are entitled to legal protection. But such indirect interest must be real; it must not be a cloak for petty legalism or mere obstruction. If this test is adopted, then it would be in each case for an international tribunal to determine, either on its own initiative or on the complaint of the signatory of the original instrument, whether the new treaty has interfered to such an extent with the true legal interests protected by the general instrument that it must be regarded as an inadmissible attempt at a substantive change of the law without the consent of the joint authors of the original treaty. As the law cannot legally be changed in this way, the new treaty would have to be held in certain cases to be invalid and therefore unenforceable. In some cases a less drastic sanction might be appropriate, for instance, the right of the original signatories to withdraw from the treaty. But where unenforceability and invalidity are the only possible solution, then that result would follow quite independently of any doctrine of non-recognition in all cases in which treaties are concluded in violation of or in consequence of violation of the principles established by previous treaties to which at least one of the signatories of the new treaty is a party. The suggested solution is in the nature of a tentative suggestion which cannot be elaborated within the limits of a short note. But it is submitted that the matter deserves careful study. It is not merely a question of the scientific unity of a system of law impatient of inconsistencies; it is a question of the reality of international law as established by treaties.

H. L.

THE AMERICAN SENATE AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE

It is our duty to put on record the fact that on January 28 last, the necessary two-thirds majority of the American Senate for the resolution approving the adherence of the United States to the Protocols of the Permanent Court of International Justice was not obtained.

RECIPROCAL ENFORCEMENT OF JUDGMENTS AS BETWEEN THE UNITED KINGDOM AND FOREIGN COUNTRIES

IN 1933 the Parliament of the United Kingdom by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, made provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to British judgments, and for facilitating the enforcement in foreign countries of British judgments.

This Act sprang from the report (*Cmd. 4213*) of a committee appointed in 1931 by the Lord Chancellor to consider what provisions should be included in conventions made with foreign countries for the mutual enforcement of judgments on the basis of reciprocity, and what legislation would be necessary or desirable to enable such conventions to be made and become effective or to secure reciprocity from foreign countries.

The committee reported (1) that a substantial grievance existed as regards the enforcement abroad of British judgments, inasmuch as British courts in the main accepted foreign judgments as conclusive and enforced them indirectly by recognizing them as causes of action, whereas foreign courts did not in effect recognize British judgments; (2) that, though foreign countries might be willing to conclude reciprocity conventions with this country, they could not do so until two obstacles had been removed, (*a*) the existing British procedure under which foreign judgments are not enforced as such; (*b*) the fact that the principles on which British courts recognize foreign judgments are not statutory but based on case law.

The main recommendation of the committee was legislation on the lines of a draft Bill annexed to the Report; this Bill, with small modifications, eventually became the Act of 1933.

The scheme of the Act is as follows:

1. A foreign judgment to which Part I of the Act applies may be registered in the High Court in England, the Court of Session in Scotland, or the High Court in Northern Ireland, and when so registered is, for purposes of enforcement and otherwise, to be treated as if it were a judgment of the registering court; the old procedure by action on a foreign judgment is abolished, the Act providing that a foreign judgment which can be enforced by registration is not to be enforceable otherwise.

2. Where the judgment debt under a foreign judgment is expressed in a foreign currency, the judgment will be registered for an amount in British currency calculated on the basis of the rate of exchange prevailing at the date on which it was given. On registration there may be added to the amount of the judgment debt a sum for interest thereon up to date and for the reasonable cost of registration.

3. The foreign judgments to which Part I of the Act applies are judgments—

- (*a*) given by the superior courts of a foreign country to which His Majesty, being satisfied that substantial reciprocity of treatment is assured in that country for British judgments, has extended Part I;
- (*b*) given after the date of the extending Order in Council;
- (*c*) which are final and conclusive;
- (*d*) under which a sum of money is payable, other than a sum payable in respect of taxes or a fine or penalty;
- (*e*) given in civil proceedings for payment of damages to an injured party.

4. Registration may be set aside in certain circumstances which correspond in the main with the grounds on which an action on a foreign judgment could be successfully resisted under the old law.

5. If a foreign country does not give substantial reciprocity in respect of British judgments, the judgments of its own courts may by Order in Council be rendered unenforceable in the United Kingdom.

6. The Order in Council extending the Act to any country may modify the terms of the rules of court made for the purposes of the Act, e.g. may provide that security for costs shall not be required on an application for registration although the rules authorize the requirement.

7. Power is given to apply Part I of the Act to His Majesty's dominions outside the United Kingdom and to British protectorates and mandated territories.

Conventions for the purpose of the Act have been concluded with two countries, viz. in January 1934 with France (*Cmd.* 4717) and in May 1934 with Belgium (*Cmd.* 4618), but neither of them has as yet been ratified.

H.

REGULATION OF WHALING

THE International Convention for the Regulation of Whaling which was made at Geneva on September 24, 1931, came into force in January 1935.

The reason for the delay is that one of its articles provided that the Convention should not come into force until ninety days after it had been ratified on behalf of not less than eight nations, including Norway and Great Britain, and though Norway and more than seven other states had already ratified the Convention, it was not possible for Great Britain to do so until the necessary sanction had been obtained by the passing of the Whaling Industry (Regulation) Act, 1934.

The main object of the Convention is to prevent the wasteful destruction of whales in the Antarctic seas.

In the absence of any restrictions the natural tendency of the whalers is to obtain the oil they need in the easiest and cheapest manner possible, and consequently where whales were plentiful they, as a rule, utilized only those parts of the carcass from which the oil could most easily be extracted, and abandoned those portions which required more labour and expense. The inevitable result of this was that more whales were killed than was absolutely necessary for procuring the amount of oil required.

The Convention provides that the fullest possible use shall be made of all whales killed, by the extraction of the oil from all parts of the carcass which contain any considerable quantities.

Other provisions of the Convention provide for the protection of certain species of whales which were in danger of immediate extinction, the imposition of control by means of a system of licences and the furnishing by the whalers of statistical information regarding the whales captured, which is to be transmitted in due course to the International Bureau for Whaling Statistics at Oslo.

The Whaling Industry (Regulation) Act goes somewhat farther than the Convention, as it empowers H.M. Government to impose a close time for whaling operations.

Under that Act a system of licences for whalers registered in Great Britain and the Colonies has been instituted, and regulations carrying out the provisions

of the Convention have been put in force, and Inspectors employed by the Ministry of Agriculture and Fisheries are now on board whaling ships in the Antarctic regions.

No close time has yet been imposed, as the Act was passed at a time when the preparations of some of the whaling undertakings were so far advanced that it would have inflicted hardship upon them to compel them to postpone the date of commencing operations, but the question of imposing such a restriction is under discussion with the Norwegian authorities, who have already instituted a close time.

The Convention was signed by twenty-six states including Great Britain, India, and the Dominions of Canada, Australia, New Zealand, and South Africa, and has subsequently been ratified or acceded to by nineteen. Its provisions have not yet been brought into operation in any parts of the British Empire other than Great Britain and the Colonies as it has not yet been found possible to pass the necessary legislation in India and the Dominions.

B.

ANGLO-NORWEGIAN TRIBUNAL FOR CLAIMS IN RESPECT OF DAMAGE TO FISHING GEAR

THE object of the establishment of this Tribunal, which was set up by an Agreement made in London on November 5, 1934, is to get rid of the difficulties arising from the fact that British and Norwegian fishermen employ different modes of fishing in the same waters off the coasts of Norway.

The Norwegian fishermen use nets and lines which are laid under water. They do not remain near their gear and watch it, but set it one day and haul it the next, and in the interval the only indications of its presence are small buoys either unlighted or carrying small lights.

The British fishermen, on the other hand, employ trawls dragged along the bottom of the sea, and even when the greatest care is taken, at times find it impossible to detect Norwegian gear in time to avoid it, and consequently inflict upon the Norwegian fishermen a loss which they find difficult to bear.

Under the ordinary law, the enforcement of a claim for compensation by Norwegian fishermen involves the arrest, by either civil or criminal process, of the trawler charged with causing the damage, and the resulting detention may well cause deterioration of the cargo of fish on board to an extent far exceeding the amount of the damage claimed, in addition to the loss of the earning power of an expensive vessel.

The situation gave rise to a great deal of bitterness and ill-feeling on both sides. The English fishermen felt they were unjustly treated by the ordinary courts and were inclined to take the view that as they were liable to be punished whether they had damaged Norwegian gear or not, it was not worth their while to take any special precautions to avoid it; and the Norwegians, thinking that their gear had been wantonly destroyed, and being unwilling to incur the expense of civil proceedings, frequently invoked the assistance of the police authorities by charging the British with trawling inside Norwegian territorial waters.

The Agreement provides for the appointment of a special Tribunal to deal with claims for damage, consisting of two persons nominated by the British and Norwegian Governments respectively. The persons actually nominated are a British Naval Officer, who was some time ago appointed Vice-Consul in

the North of Norway for the special purpose of dealing with matters relating to fishing, and the Governor of Finmarken.

The Tribunal has no compulsory powers; submissions to it are entirely voluntary and either party to the dispute who is unwilling to accept its decision can resort to the ordinary courts of law. Both Governments have, however, agreed to use their best endeavours to induce their fishermen to refer their disputes to the Tribunal, and as it will be the practice for cases to be heard expeditiously and in the neighbourhood where the damage is alleged to have taken place, it is probable that the fishermen themselves will soon realize the advantages of a method of procedure which obviates the inconvenience, delay, and expense of ordinary legal proceedings. Already a number of cases have been submitted to the Tribunal.

For the sake of uniformity a similar Tribunal has been set up to deal with cases in British waters; the members appointed are the Counsellor of the Norwegian Legation in London and the English Chief Inspector of Fisheries. It is not anticipated that they will have many cases to deal with, as it is quite exceptional for Norwegian vessels to fish in British waters.

B.

JUDICIAL PRIVILEGES AND THE PALESTINE MANDATE

THE vestiges of special judicial rights for foreigners, the last remnant of the Capitulations, have been swept away in Palestine. They were abolished in Iraq before the termination of the Mandate; and it was a grievance of the Palestinian citizen, as it had been previously of the Iraqi, that he had not complete equality before the law in his own country. Under the British Administration there has been hitherto a difference in the composition of the court which deals with the case of a foreigner. The class of "foreigner", indeed, was artificially defined during the military administration, and the definition remained. It included any person who is a national of a European or American state or of Japan, but not:

- (a) Native inhabitants of a territory protected by or administered under a mandate granted to a European state;
- (b) Ottoman subjects;
- (c) Persons who had lost Ottoman nationality and had not acquired any other nationality.

Thus, in Palestine there were three categories of persons for purposes of jurisdiction: Palestinian citizens, "foreigners" and person who were neither Palestinians nor foreigners, such as Chinese, Japanese, Iraqis, and Turks. The Palestine Order-in-Council 1922, which is, as it were, the organic statute of the country, prescribed that a "foreigner" should have certain privileges in the courts. He might claim, if accused of a minor offence, to be tried by a British magistrate; and if committed for trial for a major offence, to be tried before a court composed of a single British judge or a majority of British judges. In the more important civil cases he might claim that at least one member of the court should be a British judge, and that the court of appeal should contain a majority of British judges. Those provisions were deemed to apply the article of the mandate which lays down that "the Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners

as well as to natives a complete guarantee of their rights". It might reasonably be inferred from the article that the courts for foreigners and Palestinians should be uniform; and that inference has now been accepted and applied in an amending enactment, the Palestine (Amendment) Order-in-Council 1935. The new Order in the first place sweeps away the artificial definition of "foreigners" and substitutes for it the simpler definition: "any person who is not a Palestinian citizen". Then it abolishes the provisions for the special composition of the courts in favour of foreigners. Amending legislation in Palestine is designed to enable all persons in the country, whatever their nationality, to elect to be tried by a British magistrate or by a British judge sitting alone, and in civil cases also to apply that the action be tried by a British judge sitting alone. Another consequence of the amending Order is that the jurisdiction of the Jewish and Christian religious courts in matters of personal status will be reduced. Previously they could deal with such matters for all persons of the community who were not "foreigners" in the peculiar sense. Now their competence will be limited to those who are Palestinian citizens.

N. B.

RECOGNITION BY THE UNITED STATES OF THE GOVERNMENT OF SOVIET RUSSIA

ON November 16, 1933, after an interval of sixteen years, the Government of the United States recognized the Soviet Government of Russia. The Act of recognition took the form of a note addressed by President Roosevelt to M. Litvinoff, Peoples Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, who had come to Washington in response to a suggestion of the President that he would be glad to discuss personally with a representative of the Soviet Government all outstanding questions between the two countries. The President's letter containing this proposal, addressed to M. Kalinin, President of the All Union Central Executive Committee of Russia, added that it had been his desire from the outset to end the abnormal relations between Russia and the United States. The governments of twenty-six other countries have recognized the Soviet Government. But a good many, including Belgium, the Netherlands, Switzerland and all the Latin American countries, except Mexico, have not done so.

The principal reasons which had led the United States to withhold recognition were found in various decrees issued by the Soviet Government, confiscating or nationalizing without compensation private property including large amounts owned by citizens of the United States, the repudiation of loans made by the Government of the United States or its citizens to former Russian Governments, the denial generally by the Soviet Government of the validity of international engagements incurred by those governments and the propagandist activities of the Soviet Government or of political organizations closely affiliated with it, directed against the governments of other countries including the United States. These reasons had been advanced by Presidents Wilson and Coolidge and by a succession of Secretaries of State from 1919 to 1933. While public opinion in the United States was still divided on the question of recognition, as time passed public sentiment more and more came to demand the termination of the abnormal situation and the falling off of trade between the two countries, it being believed

that recognition would be speedily followed by a large increase of exports from the United States to Russia. As it has turned out, however, this belief was without foundation.

While recognizing the Soviet Government, President Roosevelt laid down certain conditions and insisted on formal assurances that they would be complied with by it. These conditions and the assurances given were contained in a series of notes exchanged between the President and M. Litvinoff. They related to freedom of religious worship, including religious instruction and burial rights, for American nationals in Russia, a degree of legal protection not less favourable than that accorded by Russia to the most favoured nation, and the right of Americans accused of crime to "a fair, public and speedy trial and the right to be represented by counsel of their own choice". In regard to Russian propagandist activities in the United States, fear of which had been one of the principal reasons for the refusal of the four preceding Presidents to recognize the Soviet Government, M. Litvinoff gave assurances that it would be the fixed policy of the government of the Union of Soviet Socialist Republics:

1. To respect scrupulously the indisputable right of the United States to order its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

2. To refrain, and to restrain all persons in government service and all organizations of the government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

3. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which makes claim to be the government of, or makes attempt upon the territorial integrity of, the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having the aim of armed struggle against the United States, its territories or possessions, and to prevent any recruiting on behalf of such organizations and groups.

4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions.

Regarding the claims of the Government of the United States against Russia no definitive settlement was reached, the agreement being merely a promise of the Soviet Government to discuss them. An estimate of the claims put the total amount at nearly \$700,000,000. These consisted of \$192,600,000 principal and interest due on loans made by the Treasury of the United States to the Russian Government, \$75,000,000 due on Russian bonds floated in the United States, and \$430,000,000 in the form of property losses sustained by American nationals as a result of confiscation and nationalization measures. An exchange of views between the two governments took place with regard to the methods to be

adopted for the settlement of the claims. It is understood that negotiations with this end in view are now being carried on. What the settlement will be—if any is reached—it is impossible to predict with certainty. As to the Russian claim for a huge indemnity on account of the activities of the military forces of the United States in Siberia in the years 1918 and 1919, the Soviet Government agreed to waive any and all such claims and to regard them as finally settled and disposed of. Texts of the exchanges of the communications between President Roosevelt, M. Kalinin and M. Litvinoff are printed in the *American Journal of International Law* for January 1934, Official Documents, pp. 1–11.

It is interesting to note that the recent long period of interruption in the diplomatic relations between the two countries resulting from the non-recognition by one of them of the other was not the first of its kind, for it happens that for a period approximately twice as long, that is from 1776 to 1809, Russia refused to recognize the newly established republic of the United States, mainly because the Czar looked with distrust and dislike upon republics and especially that of America. There can be little doubt that the refusal of the Government of the United States to recognize the Soviet Government was influenced to some extent by the dislike of the American people for the soviet system and its underlying principles.

JAMES W. GARNER.

HOT PURSUIT. ILLEGAL SINKING OF VESSEL ON THE HIGH SEAS —THE *I'M ALONE* CASE

ON January 5, 1935, the commissioners appointed by the Governments of the United States and Canada in pursuance of Article 4 of the Convention of January 23, 1924 (the so-called "liquor treaty" between Great Britain and the United States), to consider and report upon the claims of the Government of Canada growing out of the sinking of the Canadian schooner *I'm Alone*, made its final report, which was duly accepted by both governments as a definitive settlement of the case. The *I'm Alone* was registered in Nova Scotia and while engaged in an attempt to smuggle intoxicating liquors into the United States was sunk by the gun-fire of a coast-guard vessel on March 22, 1929, in the Gulf of Mexico about 200 miles off the Louisiana Coast. The Canadian Government claimed of the United States an indemnity of \$386,303 for the owners of the schooner and as compensation to its master and members of the crew or their families. The Government of the United States justified the sinking of the *I'm Alone* outside the territorial waters of the United States on the doctrine of hot pursuit. The Canadian Government appears not to have denied a limited right of hot pursuit but contested the extensive interpretation which the United States placed upon it and also its applicability in the present case, since the pursuit was begun outside the three-mile limit ($10\frac{1}{2}$ miles from shore) and was moreover not continuous, the schooner having been sunk by another vessel than the one which actually began the pursuit. It contended that hot pursuit as recognized by international law is limited to pursuit begun within the territorial waters of the pursuing state and these waters do not extend beyond three miles from shore. Both Great Britain and the United States had affirmed this principle in article one of the liquor treaty.

Even admitting the American interpretation of the rule of hot pursuit, the

Canadian Government contended that there was no legal justification for the deliberate and intentional sinking of the schooner. While the treaty of 1924 conceded to the United States the right of seizure within an hour's sailing distance from the shore, it was silent as to the right of hot pursuit whether begun within the three-mile zone or within the zone of one hour's sailing from the shore, as it was also silent in regard to the right to sink an offending vessel which refused to surrender when summoned to do so by the pursuing vessel. The United States appears to have taken the position that the right of hot pursuit, being an established rule of customary international law, did not need to be formally expressed in a convention. In the present case the right of search and seizure beyond the three-mile limit had been expressly conceded by the treaty of 1924; the right of hot pursuit was therefore a corollary of this right and could be commenced anywhere within the zone in which the latter right was exercisable, even beyond the three-mile limit.

The Federal Courts of the United States had in several cases upheld the right of hot pursuit under the treaty of 1924 even when begun beyond the three-mile limit, provided it were within one hour's sailing distance from the coast. The *Pescawha*, 19 Fed. (2d) 506, the *Newton Bay*, 30 Fed. (2d) 444, and the *Vinces*, 20 Fed. (2d) 164. Although the vessels seized in those cases were of British nationality no protests were made against the application of the rule of hot pursuit in the circumstances mentioned. In a communication of April 17, 1929, to Mr. Massey, the Canadian Minister at Washington, the Secretary of State of the United States thus stated the American view:

"In the estimation of this Government, the correct principle underlying the doctrine of hot pursuit is that if the arrest would have been valid when the vessel was first hailed, but was made impossible through the illegal action of the pursued vessel in failing to stop when ordered to do so, then hot pursuit is justified and the *locus* of the arrest and the distance of the pursuit are immaterial, provided:

- (1) that it is without the territorial waters of any other state;
- (2) that the pursuit has been hot and continuous."

Regarding the Canadian contention that the pursuit was not continuous because the *I'm Alone* was sunk by a different vessel from the one which began the pursuit, the Secretary of State added that the vessel which began the pursuit was present at all times until the *I'm Alone* was sunk by the other vessel which had been called for assistance in view of the fact that the pursuing vessel had jammed its gun. In fact, both vessels were operating conjointly as a unit of the same force and under one command. As to the question whether the coast-guard officers were justified in sinking the *I'm Alone*, the Secretary of State asserted that its master was repeatedly warned and summoned to surrender but refused to do so, preferring to have his vessel sunk rather than taken into a court of the United States for a trial on the charge of attempting to violate the law of the United States. Under the circumstances, the coast-guard officers had the choice of sinking it or allowing it to escape. If the policy were adopted of allowing offending vessels under such circumstances to go free, the purpose of the liquor treaties would in large part be defeated.

The dispute having in August 1929 been referred by the parties to a commission consisting of Justice Van Devanter of the United States Supreme Court and the Rt. Hon. Lyman P. Duff of Canada, they made an interim report on June 30, 1933, in which they affirmed their competency to inquire into the

question of the beneficial or ultimate ownership of the *I'm Alone* and as to the management and control of the schooner—a competency which the Canadian Government denied. At the same time they reported that in their opinion the United States coast-guard officers were not justified by any provision in the treaty of 1924 in intentionally sinking the vessel. In their final report dated January 5, 1935, they added further that the sinking was not justified by any principle of international law. Their opinion, however, appears to have assumed that the United States was justified in exercising the right of hot pursuit in the circumstances mentioned, that is, beyond the three-mile limit so long as it was begun within that zone. It appears also to have been the *intentional* sinking of the *I'm Alone* that was held unjustifiable; had it been sunk as an incident of the exercise of hot pursuit the sinking would not have been unjustifiable.

The commissioners having found that the vessel, although of Canadian registry, was in fact owned, controlled, and at the critical times managed, and her cargo dealt with and disposed of, by a group of persons who were entirely, or nearly so, citizens of the United States, refused to recommend compensation in respect of the loss of the ship and cargo. They recommended, however, payment by the United States to the Canadian Government of the sum of \$25,666.50 for the benefit of the master and members of the crew, since they were not participants in the illegal conspiracy to smuggle liquor into the United States. Included in this amount was \$10,185 as compensation for the widow and children of a French national who was drowned when the schooner was sunk.

Having held the sinking of the *I'm Alone* to have been legally unjustifiable, the commission recommended that the United States formally acknowledge the illegality, apologize to the Canadian Government for its unlawful act, and pay it as a "material amend" therefor the sum of \$25,000. On January 21, 1934, the apology was formally tendered by the Secretary of State in a note addressed to the Canadian Minister at Washington, and the Secretary announced that steps would be taken to pay to the Government of Canada the sum recommended.

JAMES W. GARNER.

AGREEMENT FOR THE SETTLEMENT OF AMERICAN CLAIMS AGAINST TURKEY

By an exchange of notes dated December 24, 1923, the Government of the United States and the Government of Turkey entered into an agreement which provided that a Commission should be designated to adjudicate all claims outstanding between the two Governments, mainly claims growing out of seizures of American property in Turkey during the World War. A supplementary agreement was concluded by an exchange of notes dated February 17, 1927. As a result of subsequent exchanges of communications, the two Governments agreed, with a view to the amicable, expeditious and economic adjustment of the claims, that the Commission should in the first instance undertake a summary examination of the cases for the purpose of recommending to the two Governments a lump sum settlement. On October 13, 1934, the members of the Commission signed an agreement recommending that the Government of Turkey should pay to the Government of the United States the sum of \$1,300,000 in settlement of the American claims. This agreement was later confirmed by agreement between the two Governments signed October 24, 1934.

The Government of the United States laid before the Commission 898

dossiers prepared by claimants. In the unanimous opinion of the Commission, 573 of these claims were obviously without legal foundation. The remaining 325 will receive further consideration by the Government of the United States.

JAMES W. GARNER.

THE STATUS OF THE UNITED STATES-MEXICAN MIXED CLAIMS COMMISSIONS

THE awards of the two mixed commissions (general and special) set up by the United States and Mexico in pursuance of the conventions of September 8 and 10, 1923, have been reviewed in the *Year Book* from time to time since their organization (*Year Book* for 1927, p. 179; 1928, p. 156; 1930, p. 220; and 1931, p. 166). The duration of both commissions expired in August 1931, the last awards having been made in July of that year. A large number of claims remained undisposed of at the time the commissions expired. On June 18, 1932, conventions for prolonging for a further period of two years both commissions were signed in the city of Mexico and along with them two protocols each dealing with the functions and procedure of one of the commissions. The first protocol, which supplemented the general claims convention, was not considered as requiring the advice and consent of the Senate for its ratification, but the second one, which supplemented the special claims convention, was, by reason of certain matters with which it dealt, deemed to require the approval of the Senate. The Senate adjourned, however, on June 15, 1933, without taking action on either the latter convention or protocol.

The General Claims Commission, it is understood, will in the near future resume its hearings of the undisposed cases that are to be submitted to it. As to the undisposed special claims, a new convention dealing with them was signed on April 24, 1934, under which Mexico agrees to pay the United States a lump sum in settlement of them, the amount to represent the same average percentage of liability that Mexico has agreed to pay on the same class of claims to the governments of Belgium, France, Germany, Great Britain, Italy, and Spain. The exact amount is to be computed and determined by a joint committee of two persons representing the two countries. This committee will also determine in the first instance what claims shall be submitted to the General Commission and which are to be settled in accordance with the special claims convention and protocol. This procedure for the settlement of the group of special claims was adopted because it was believed to be a more economical and expeditious one than recourse to formal arbitration. It is understood that the lump sum paid to the United States by Mexico will be distributed among the individual claimants on the basis of the merits of their respective claims, by a domestic commission to be established by an Act of Congress.

JAMES W. GARNER.

RECENT AMERICAN NATIONALITY LEGISLATION

EQUALITY OF MEN AND WOMEN

By recent legislation of the Congress of the United States the last vestiges of inequality between men and women in respect of the acquisition and loss of nationality have been removed. It will be recalled that by the so-called Cable Act of September 22, 1922 (see this *Year Book*, 1923-4, p. 169), the old rule that

an American woman who married an alien lost her American nationality was abrogated. This law, however, made an exception in the case of an American woman who married an alien ineligible to citizenship under the laws of the United States, for example a person of Japanese, Chinese, or Indian nationality. In that case she lost her American nationality as the result of marriage to such an alien. American women in large numbers complained at this provision of the law because it was discriminatory, since it did not apply to men who married such aliens. By the Act of March 3, 1931, the exception was repealed so that now no American woman who marries an alien, whether he be ineligible or not to naturalization under the laws of the United States, loses as a result of marriage her nationality, unless she elects to take the nationality of her husband.

One final source of inequality as between men and women in respect to their nationality still remained. It was found in the provision of the law which treated as citizens of the United States children born of American *fathers* abroad. Under that law a child born abroad of an American mother was not a citizen of the United States unless the father was a citizen thereof. By an Act of Congress approved May 24, 1934, the law was amended so as to confer American nationality upon any child born abroad whose father *or mother* was at the time of its birth a citizen of the United States. The same Act provided that a child born abroad of alien parents should be deemed a citizen of the United States by virtue of the naturalization or resumption of American citizenship by the father *or mother*, and that an alien who marries a citizen of the United States or one whose husband *or wife* is naturalized after the passage of the Act shall not become a citizen of the United States by virtue of such marriage or naturalization. As a result of this legislation, women now appear to be on an exact footing of equality with men in all respects, in so far as concerns the acquisition or loss of American nationality.

JAMES W. GARNER.

THE DOCTRINE OF THE *THALWEG*

THE case of *New Jersey v. Delaware*, decided by the United States Supreme Court on February 5, 1934 (291 U.S. 361), added another to the somewhat long list of cases involving disputes between states of the American Union concerning the location of the boundary line in the rivers which separate them. The question in this case was as to where in the Delaware river, which separates the states of New Jersey and Delaware, was located the true boundary line between them. As to this question there had been more or less controversy between the two states almost from the establishment of the Union. The Supreme Court held that, save for that part of the boundary within a circle of twelve miles about the town of New Castle where it was held, on the basis of certain grants of the British Crown in the seventeenth century and certain acts of the Delaware legislature, that the boundary line was the low water mark of the Delaware river on the New Jersey side, the true boundary was the *Thalweg* or middle of the main channel of navigation in the river.

In a learned opinion written by Mr. Justice Cardozo he reviewed the doctrine of the writers on international law and the jurisprudence of the courts, relative to the location of the boundary line in streams which separate states, and concluded that "International law to-day divides the river boundaries between states by the middle of the main channel when there is one, and not by the

geographical centre half way between the banks". "The underlying rationale of the *Thalweg*", he said, "is one of equality and justice. 'A river', in the words of Holmes J. (*New Jersey v. New York*, 283 U.S., 336, 342), 'is more than an amenity, it is a treasure.' If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other. Considerations such as these have less importance for commonwealths or states united under a general government than for states wholly independent . . . None the less, the same test will be applied in the absence of usage or convention pointing to another. International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."

Then after tracing the origin and development of the doctrine of the *Thalweg*, in the course of which he cited numerous writers on international law, the provisions of treaties and decisions of the Supreme Court, he concluded that "there has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance and not equality in name only. Unless prescription or convention has intrenched another rule (Westlake, *International Law*, Vol. I, p. 146) we are to utilize the formula that will make equality prevail." This formula being expressed in the rule of the *Thalweg* it was applied by the Court in the determination of the true boundary line between the two disputing states.

JAMES W. GARNER.

NATIONALITY

EFFECT OF NATURALIZATION OF FATHER UPON MINOR CHILDREN

IN the case of the *United States of America v. Area Marjorie Reid*, the United States Circuit Court of Appeals for the Ninth Circuit was called on to decide whether a child born within the United States and taken to Canada during infancy by her father who was there naturalized while she was a minor, lost her American citizenship in consequence of the naturalization of her father. The United States District Court (6 F. Supp. 800), before which the case was first brought, held that she did not lose the citizenship which she had acquired by birth in the United States, notwithstanding the fact that the laws of Canada provided that such persons should be deemed to be British subjects, and also notwithstanding the fact that the treaty of September 16, 1870, between Great Britain and the United States provided that the United States should consider such persons as naturalized British subjects. The District Court took the position that American born citizens cannot by treaty or otherwise be deprived of their citizenship without their consent, although it admitted that an American born child taken during its minority to a foreign country where the father was naturalized might for "some purposes" be deemed a citizen of such country. But such person retained American citizenship and upon attaining majority had a right to elect the nationality which it preferred. This decision was overruled by the Circuit Court on the ground that the treaty which obliged the United States to treat such a person as a British subject was binding on the United States and must be applied by the courts. There was no doubt, in the opinion of

the Court, that the conclusion of the treaty was within the competence of the treaty-making authorities. The Court further pointed out that the United States had from the beginning consistently followed the principle that naturalization in a foreign country of the father of an American born child had the effect of conferring upon the child the nationality of the father. Adverting to the view of the District Court that the petitioner was both a citizen of the United States and of Great Britain with a right of electing the nationality she preferred upon attaining her majority, the Circuit Court called attention to the fact that the purpose of the treaty of 1870 and of the laws enacted by both contracting states, or impliedly recognized thereby, was to do away with cases of dual nationality arising out of the naturalization laws of both countries. It was clear therefore that the petitioner became a British subject by the naturalization of her father and that such naturalization terminated her American citizenship.

JAMES W. GARNER.

IMMUNITY OF STATES OF THE AMERICAN UNION FROM SUITS BY FOREIGN STATES

THE decision on May 21, 1934, of the United States Supreme Court in the case of the *Principality of Monaco, Plaintiff v. The State of Mississippi, Defendant* (292 U.S. 313; text of the decision also in *American Journal of International Law*, Vol. XXVIII, July 1934, p. 576), that a suit cannot be brought against a member state of the American Federal Union by a foreign state without its consent, definitively puts an end to a controversy which has existed in the United States almost from the beginning of its existence as an independent republic. While the question involved was one mainly of constitutional law, the decision is not without interest to students of international law. In brief, the facts were that "three generous persons, bondholders by inheritance" (Mary Elliot and Baron Tweedmouth of London and Giovanni del Diago of New York), had made an unconditional gift of bonds amounting to \$100,000 which had been repudiated by the state of Mississippi some ninety years ago, to the Principality of Monaco to be used by it for such purposes as it might see fit. In presenting the gift to the Principality the donors stated that they had been advised by their lawyers that they could not themselves bring a suit against the State of Mississippi and that such a suit could only be brought by a foreign state.

The Principality thereupon asked for leave to bring suit against Mississippi for recovery of the amount of the bonds. The clause of the Federal Constitution (Art. III, sec. 2) relative to the jurisdiction of the Supreme Court in such cases declares that "The judicial power of the United States shall extend . . . to controversies between two or more states . . . and between a state . . . and foreign states." The Supreme Court some years ago had held by a bare majority that its jurisdiction extended to suits brought by one state of the Union against another state of the Union (*South Dakota v. North Carolina*, 1903, 192 U.S. 286) for the recovery of the amount of repudiated bonds given by the holders thereof to the defendant state; this on the ground that when the latter state became a member of the Union it thereby waived its immunity and gave its consent to being sued in the Supreme Court by other states. The Principality of Monaco relied largely on this decision, its position being that if the constitutional provision quoted above authorized the Supreme Court to entertain

jurisdiction of a suit brought by one state of the Union against another state of the Union, it authorized equally the Court to entertain jurisdiction of a suit brought by a foreign state against a state of the Union. But no such suit had ever before been attempted. In 1916 the Republic of Cuba had asked leave to file a bill against the State of North Carolina for the recovery of the amount of certain bonds repudiated by that State and which had come into possession of the government of Cuba, but later the bill was withdrawn and the Supreme Court was not therefore called upon to decide the issue as to its jurisdiction to hear the case (242 U.S. 665). As to the right of a foreign state to sue a state of the Union in the Supreme Court without the consent of such state, certain justices of the Court had at different times pronounced dicta but they were not in agreement. The debates in the convention which adopted the constitution throw no light on the intention of the framers in regard to the matter, although some of the "fathers" like Madison, Hamilton, and Marshall had expressed opinions elsewhere that no such suits could be entertained by the Supreme Court. The Eleventh Amendment to the Constitution, adopted in 1798, excludes from the jurisdiction of the Court suits brought against one of the United States by citizens of another state or by citizens or subjects of a foreign state, but it is silent as to suits brought by a foreign state itself, which was the question at issue in the present case.

After an examination in its various bearings of the nature of the "constitutional plan" of the Union, one of the postulates of which was the immunity of the states composing it from suits brought against them without their consent, the Court reached the unanimous conclusion that it had no jurisdiction to hear the case of Monaco against Mississippi. North Dakota, for example, might bring suit against her because she had waived her immunity when she joined the Union and became subject to the constitution which confers jurisdiction on the Court to entertain suits against her. But Monaco could not do so because Mississippi had never given her consent directly or indirectly to be sued by a foreign state. As to this the Court said:

"The foreign state lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favour of a foreign state. As to suits brought by a foreign state, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign state. The foreign state enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union."

While it is regrettable that a foreign state or a citizen of a foreign state, the owner of bonds which have been issued and repudiated by a political subdivision of another state, has no judicial remedy in the courts of the latter state, it can hardly be said that a state is under an international obligation as the law now stands to open its courts to suits against such subdivisions by foreign states or their citizens. It is a fair question to raise, however, whether a state which organizes itself on the federal principle under which its political subdivisions are permitted to incur obligations to foreign states but for the performance of which the state will not allow them to be sued in its courts, is not itself respon-

sible under international law for the losses suffered by foreigners in consequence of the repudiation of those obligations. Whatever the facts may be as to the rule of international law on this point, there would seem to be a moral obligation which cannot be overlooked.

JAMES W. GARNER.

OUTLAWRY OF A FOREIGN SOVEREIGN

IN connexion with the case reported in Selden's *Table Talk* (see last year's issue of this *Year Book*, p. 145), the references and details given below may be of interest.

In the report of *Nabob of the Carnatic v. East India Company*, 1 Ves. Jun. 371 (1791), there is the following note on p. 386:

"The Lord Chancellor [Thurlow] also observed, that the King of Spain had been once outlawed by Selden's advice to prevent him from taking advantage of his suit; that the outlawry was bad enough, but good till reversed; therefore it was necessary for him to come in to reverse it, in order to take advantage of his suit. His Lordship said, he could not quote a better book for this than Selden's *Table Talk*."

Gondomar was in England from 1613 to 1618, and again from 1619 to 1622. With regard to Selden's reference to other litigation in which the King of Spain was concerned, it may be mentioned that instances of Gondomar suing on his master's behalf in respect of wrongs alleged to have been done to Spanish subjects are to be found in Hobart 78 and 113, and in 2 Bulstrode 322.

P. L. B.

THE PARIS MEETING OF THE INSTITUTE OF INTERNATIONAL LAW, 1934

THE Institute met at Paris for the week from the 15th to the 20th of October in the historic halls of the Palais Royal. The intention had been to meet at Madrid, but the troubles in Spain made this impossible. Among British members a notable gap was apparent by the absence of the honoured veteran, Sir Thomas Barclay.

The work fell under two main heads, first, the formulation of the principles by which the exercise of reprisals in international disputes should be regulated, and second, a general approach to matters concerning those who pass on the sea or navigable waters "upon their lawful occasions".

The subject of reprisals, the use of force falling short of war by one state against another, has peculiar importance at a time when the nations by the Briand-Kellogg Pact have renounced the use of war as an instrument of policy. There is, as recent events have shown, a real danger that by the use of violent measures under the name of reprisals the very thing that has been in words renounced may in fact reappear or continue. Thus the question of the limits and perhaps of the very existence of a right to reprisals under the new legal conditions is fundamental in modern international relations. The nations of the world have by a binding international instrument pledged themselves to abandon war as an instrument of national policy and—what is perhaps an even more important and comprehensive engagement—to employ nothing but pacific means for the solution of international differences. After such an engagement is there any room left for the exercise of those "measures of constraint"—such for

example as embargoes on trade, pacific blockades, seizure of customs houses—which the older international law recognized as legitimate answers to conduct which was itself an infringement of international rules? The answer is perhaps not as simple as might appear at first sight. In the past such measures have had the merit of settling international difficulties without a resort to war. But if the new international machinery provided by the League of Nations for states members of that institution and the procedure of consultation which seems a necessary corollary of the Briand-Kellogg Pact, proves itself effective (and it is too early as yet to dogmatize on this point), it is obvious that the practice of reprisals, at any rate by the use of armed force, must be superseded.

In the result the Institute accepted, with some amendments not of great importance, a resolution prepared by a Committee of which M. Politis was *rapporteur*, defining the limits in which reprisals may be regarded as still legitimate. Of these limits the most important was that the only reprisals admissible are those which do not involve the use of military, naval, or aerial force; “armed reprisals” (it is hardly necessary to say that the Institute was too discreet to cite contemporary examples) should be admitted or forbidden in the same conditions as open warfare. And, like war in modern conditions, all reprisals, whether involving the use of armed force or not, were declared to be a matter of international concern—a matter, that is, on which all states have the right to express an opinion—and thus to be subject to what was called, in a temper expressive perhaps of hope rather than of actualities, a *contrôle* (“supervision”) of an international character.

The necessary resolution was passed by a large majority—52 voting for and only 2 against, but there were 8 abstentions, among which it was significant that there appeared the respected names of some of the American members of the Institute. For them (and theirs was perhaps the path of wisdom) the Briand-Kellogg Pact was enough in itself. And indeed, as is shown by the deliberations this year at Budapest of the other important organization for the study and development of International Law, the International Law Association, it is by using that instrument as one of the chief foundations that the world as a whole would find it possible—if and when it turns to such a task—to build the inevitable constructions of peace.

The approach of the Institute to the question of the organization of human relations on and with the sea and other great waters was more cautious. With the rush of mechanical development problems of the sea are presenting themselves under new forms. Modern whaling, if unrestricted, is within measurable distance of annihilating the whales. What has happened to whales may in no very long time threaten other species of fish. On much of the Cornish coast pilchards are with the roses of yesteryear. Whether the sea be *res communis* or *res nullius*, mankind cannot afford to lose its fish supply, nor can it suffer the unrestrained pollution of the waters of the sea, as by oil or sewage, with the consequent destruction of marine life and of human amenities. Unregulated exploitation may result in a common disaster. The resources of the sea are not, as the fishermen and the lawyers of the last century imagined, inexhaustible.

In this process of thinking, the international lawyers gathered at the Institute made a prudent and tentative beginning. A permanent central international organization is recommended; such an organization, it may be understood though it is not specifically stated, would develop from the international scientific

commissions which are already in operation for European waters. Its functions would be modest at any rate to begin with; it is not worth while to reproduce the simple list. The *rapporteurs* in this matter were Professor Strupp, whose 50th birthday is to be the occasion of a *Festschrift*, and Professor Gilbert Gidel, whose book on legal questions connected with the sea is familiar to all international lawyers.

Finally, on the report of M. Vallotton d'Erlach the Institute approved a model convention on the navigation of international rivers.

The 1934 Session of the Institute was held under the shadow of violent events and in a week of poignant emotion for the civilized world and specially for our French friends and neighbours. Such meetings do not often attract much contemporary attention; they do not make history, it is enough if, occasionally, they prepare it.

J. F. W.

THE INTERNATIONAL LAW ASSOCIATION CONFERENCE AT BUDAPEST

A CONFERENCE in retrospect must needs bear the tints of its setting, and our recent gathering in Hungary follows the rule. It retains the glow of complete friendliness surrounding serious endeavour. Of friendliness it must seem to its participants superfluous to speak, for in prospect this was assumed while in experience it was both general and convincing and such as ripens into numerous intimacies the ties of which will hold.

From His Serene Highness the Regent, who graciously received in the Royal Palace invited guests coming from no fewer than twenty states; from the Royal Hungarian Government; from the Burgomaster in the name of the City; from the Hungarian Jurists' Association with the Budapest Bar, and from many an individual, genial hospitality was enjoyed by the visiting members to the number of about two hundred. Though smaller than at some conferences, this was a satisfactory number if we consider the distance, the expense, and not least the state of central Europe, for close on the chosen date of September 6 it became quite uncertain whether the dark clouds which threatened the route would burst and flood the track.

The Conference assembled in the Academy of Science; according to custom, a change in the presidency of the Association was made at the inaugural meeting, Lord Blanesburgh making way for H.E. Stephen Osvald, now First President of the Supreme Court, who was also elected President of the Conference, with H.E. Andres Lazar, Minister of Justice, as its Honorary President. The addresses of welcome, having been delivered by the Honorary President, the new President and the Deputy Burgomaster, were responded to by Lord Blanesburgh, H.E. Dr. Walter Simons, Professor A. de Lapradelle, H.E. Dr. Bertoni, and Mr. Whitman.

The most important subject discussed was the Report, drafted by the Committee on Conciliation between Nations, on the Effect of the Briand-Kellogg Pact of Paris on International Law. The Report suggested Articles of Interpretation, which, with slight modifications, were adopted by the Conference as the Budapest Articles of Interpretation; these articles take note that "the Pact is a multilateral law-making treaty whereby each of the High Contracting

Parties makes binding agreements with each other and all of the other High Contracting Parties"; they recognize *inter alia* that a signatory state cannot by denunciation or non-observance of the Pact release itself from its obligations thereunder; that a signatory state by threatening a resort to armed force or aiding a violating state itself violates the Pact; that a non-belligerent state may refuse to a violating state the rights of visit and search, blockade, &c., and decline to observe the old-fashioned duties of a neutral, but on the other hand may even with armed forces assist the state attacked without itself violating the Pact. The articles go on to declare that signatory states are not entitled to recognize territorial or other advantages acquired by a violating state as having been acquired *de jure*, but that such a state must indemnify any signatory state for all damage. The discussion had the great advantage of the expert presidency of Professor Manley O. Hudson, professor of International Law at Harvard University, who came from Geneva for the purpose. He closed the discussion by saying "The Budapest Articles of 1934 will go into history".

Additional resolutions were then passed recognizing the right of all signatory states to insist on their interests being safeguarded in a subsequent treaty of peace, and reminding states of their duty without delay to enact domestic legislation to implement their treaty obligations.

It will be remembered that the excuse of several states for supplying arms to warring nations has been that they had passed no adequate legislation to implement the Briand-Kellogg Pact.

The course of the rest of the agenda may be summarized as follows: On behalf of the French Branch, Professor A. de Lapradelle presented a report on the Creation of International Courts of Private Civil Law, the intention being to facilitate through bilateral conventions the access of individuals to such a court whether by citing a state or another person, whether in the first instance or by way of appeal. Some part of the details were left over for the next Conference, but the main intention was approved. Dr. jur. Hanna Katz of Berlin presented the report of the Committee on Trade Marks, which was chiefly concerned with the London Convention for the Protection of Industrial Property of 1934. In consequence of the discussion the suggestion of the amendment of Article 8 on Trade Names was approved and several fresh suggestions were referred back to the Committee. It was unfortunate that Me. Paul J. Govare was prevented by illness from supporting the Model Arbitration Clause (Commercial) prepared by him on behalf of the French Branch, the consideration of which was eventually adjourned. The report presented by Professor Pósch on payments in Gold and other Currencies, and its recommendations, while approved in general, were also adjourned, as were the interim report on Insolvency, presented by Professor Hans Fritsche for the Swiss Branch, and that on Cartels which Dr. F. de Király presented for that Committee. Final reports are expected on these subjects at the next Conference, which is to be held in Paris in 1936.

In his farewell speech H.E. Stephen Osvald said that not the least advantage of conference meetings such as these was that over and above any solid achievements of the discussions was the inestimable value of the meeting together in frank intercourse of men of so many different centres and without governmental obligations; yet skilled in the law and accustomed to weigh their words.

Warm acknowledgments were expressed to the Ladies Reception Committee, of which the Honorary President was H.E. Mrs. A. Lázár, and the President

H.E. Mrs. Árpád de Guilleaume, who daily devoted themselves to the entertainment of the ladies attending the Conference.

On the way home many members stopped at Vienna to take part in two receptions, one by the Austrian Branch of the Association, and the other, in the former Palace of Prince Eugene, by the Austrian Minister of Justice. Among those present was the British Minister to Austria, Sir Walford Selby.

W. A. B.

HAGUE ACADEMY OF INTERNATIONAL LAW

A portrait of Professor Westlake is being added to the collection of portraits of distinguished jurists now in course of formation at the building of the Academy of International Law at The Hague. The portrait is a copy of a work of Mrs. Westlake, who more than once painted with knowledge and fidelity a likeness of her husband. The cost was met by subscriptions from all the British international lawyers who have taken part in the work of the Academy.

DECISIONS, OPINIONS, AND AWARDS OF
INTERNATIONAL TRIBUNALS
JUDGMENTS OF THE PERMANENT COURT OF INTERNATIONAL
JUSTICE

JUDGMENT DELIVERED MARCH 17, 1934¹
Lighthouses Case between France and Greece.

THIS case was submitted to the Court by a special agreement signed in Paris on July 15, 1931, and subsequently ratified, under which the Court was asked to decide whether a contract concluded in 1913 between a French firm and the Ottoman Government extending the duration of concession contracts granted to the firm was duly entered into, and accordingly operative as regards the Greek Government so far as concerns lighthouses situated in the territories assigned to Greece after the Balkan wars.

The concession in question was for the management, development and maintenance of the system of lights on the coasts of the Ottoman Empire in the Mediterranean, the Dardanelles, and the Black Sea. It was first granted to the French firm in 1860 and renewed from time to time, the last occasion being the contract of 1913 which formed the subject of this case. By this contract the concession which was due to expire in 1924 was renewed until 1949.

The concession provided that the concessionnaires were authorized to collect lighthouse dues, one half of which they retained as their remuneration and the other half of which was reserved to the Ottoman Government. That Government had on several occasions used its share of the receipts as security for loans which it desired to negotiate.

The contract of 1913 was concluded in the following circumstances. On April 1 of that year a Decree Law was issued whereby the Sultan authorized the Ottoman Minister of Finance to conclude the contract and to sign instruments relating to a loan repayable out of the Imperial Government's share of the lighthouse receipts. The contract was signed on the same day, and the loan instruments on April 2, 1913. The Decree Law was published in the Official Turkish Gazette of May 14, 1913, ratified by the Turkish Parliament on December 18, 1914, and promulgated by a Decree dated December 22, 1914, and published on December 26, 1914.

At the time when the contract was made military operations in the first Balkan war had been resumed after the temporary failure of the peace negotiations initiated in London in December 1912. These operations were terminated at the end of April 1913 by the capitulation of Scutari, and the Treaty of London was signed on May 30, 1913. The Great Powers had submitted preliminary peace conditions to the belligerents on March 31, 1913, which Turkey accepted on the following day, but the Balkan Allies not until April 20. From the very outset of the war the greater part of Turkey in Europe had been occupied by the Balkan Allies and, so far as the Mediterranean coasts and islands are concerned, by Greece. According to the proposal of the mediating Powers Turkey was to

¹ Series A/B, No. 62. The Court's publications can be obtained from the English agents: Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

cede the occupied continental territories; to abandon her interest in Crete; and the question of the Aegean islands was to be left to the aforesaid Powers for decision. The Treaty of London followed the main lines of this proposal, and in February 1914 the Powers assigned the islands, other than Imbros, Tenedos, and Castellorizo, to Greece. The Treaty of London was never ratified and it made no provision in regard to concessions in ceded territories.

The second Balkan war was terminated as regards Greece and Turkey by the Treaty of Athens of November 1, 1913, which duly came into force on November 16 of that year. This treaty maintained the territorial clauses of the Treaty of London, and under Article 5 of the Treaty of Athens rights acquired up to the time of the occupation of the ceded territories were to be respected.

After the Great War the relations between Greece and Turkey were to have been settled by the Treaty of Sèvres, which laid down rules for the treatment of concessions, but this treaty never came into force and the relations between the two countries were only finally settled by the instruments signed at Lausanne in July 1923, France being among the signatories. The question of concessions was dealt with in Protocol XII. This draws a distinction between territories detached from Turkey under the Treaty of Lausanne and territories detached from Turkey in consequence of the Balkan wars. In regard to the former the Protocol fixes October 29, 1914, as the decisive date for the recognition of concessions; in regard to the latter, it adopts the date of the entry into force of the treaty under which the territory was transferred in each case.

Negotiations took place between the concessionnaires and the French Government, on the one hand, and the Greek Government, on the other, with a view to solving the difficulties arising out of the territorial changes of 1913, but no settlement was arrived at, and in 1929 the Greek Government took over the whole of the lighthouse system in their territory. The French Government had suggested in 1926 that the case might be submitted to the Court, and this suggestion was ultimately accepted by the Greek Government, with the result that the special agreement of reference was concluded as stated above.

The proceedings before the Court revealed a considerable difference of opinion between the parties as to the meaning and scope of the questions submitted to the Court by the Special Agreement. After careful consideration of the agreement itself, as well as of certain preliminary drafts and the Lausanne Protocol, the Court came to the conclusion that it was called upon to deal with three points of substance: (1) the scope of the contract of 1913, (2) whether this contract was duly entered into according to Ottoman law, and (3) whether it was enforceable against Greece.

As to (1), the Court rejected the Greek argument that, having regard to the circumstances prevailing at the time, the parties to the contract did not intend to renew the concession in so far as territories then in the occupation of the Balkan Allies were concerned. The Court held that everything pointed to the fact that the renewal was intended by the Ottoman Government and the concessionnaire to cover, as it purported to do, the whole pre-existing concession, irrespective of the fact that certain Turkish territories covered by the concession were at the time occupied by other Powers. The fate of those territories was, as appears from what is stated above, not decided at the date of the contract.

As to (2), according to Ottoman law the grant of concessions took the form of contracts made between the concessionnaires and the Government, the Govern-

ment, subject to certain exceptions, requiring legislative authorization to enter into the contract. The Court therefore had to consider whether all the formalities laid down by law had been fulfilled. The Turkish decree law of April 1, 1913, authorizing the Government to make the contract now in question was not the result of parliamentary legislation, but was issued by the Government in virtue of powers conferred under Article 36 of the Ottoman Constitution. This article provided that such provisional laws could be issued "in case of urgent necessity" if the General Assembly is not sitting. The Greek Government contended that authorization to renew a concession which did not, as a matter of fact, expire until 1924, could not in 1913 be a matter of urgency.

Upon this point the Court held that the powers conferred on the Ottoman Ministry by Article 36 of the Constitution were genuine legislative powers, and that any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent. Such discretion was clearly granted in the present case. The discretion involves appreciating political considerations and conditions of fact, a task which the Government alone is qualified to undertake. It follows that the Ottoman Government, in the first instance, and subsequently the Turkish Parliament, were alone qualified to decide whether a given decree law should, or should not, be issued. The Court was therefore not called upon to consider whether the Decree Law of April 1, 1913, complied with the conditions rendering its issue expedient according to the Ottoman Constitution.

Another point taken by the Greek Government was that the Decree Law of April 1 was invalid because when it was ratified by the Turkish Parliament as late as December 1914 the Turkish Parliament no longer possessed jurisdiction over the ceded territories, and so had no power to ratify a decree law affecting those territories. The Court rejected this argument on the ground that under the terms of the Turkish Constitution a decree law is valid as legislation from the time of its issue and so continues unless and until, having been laid before Parliament, it refuses ratification. There is no analogy between provisional legislation of this kind and a private law contract subject to a condition.

Accordingly, the Court upheld the validity of the contract of 1913 according to Turkish law.

With regard to question (3) the Court observed that it was not necessary for it to express an opinion upon the question which had been raised as to whether according to general rules of international law the territorial sovereign is entitled, in occupied territory, to grant concessions legally enforceable against the state which subsequently acquires the territories it occupies. Here the question whether the contract of 1913 was operative as regards the Greek Government depended upon a treaty clause, namely, Article 9 of Protocol XII of Lausanne. This Article provides for the subrogation of the Succession States in territories detached from Turkey after the Balkan wars as regards concessionary contracts entered into by the Ottoman Government before the coming into force of the treaty providing for the transfer of the territory and as from that date. The Greek Government was not entitled to object to its subrogation on the ground that certain territories were occupied by Greek troops at that time. The contract was concluded on April 1, 1913, whereas the Treaty of Athens which assigned some of the territories in question to Greece did not come into force until November 16, 1913. Therefore, in the present case, the date of the concessionary contract

could not be a ground of objection to the subrogation of the Greek Government. The only objections to subrogation which the Protocol admits are those based on the date or the validity of the concessionary contract. Neither of these grounds of objection applied to the present contract.

The Greek Government also argued that the treatment of concessions was a question which was definitely settled by the Treaty of Athens—Article 5 of which required Greece to respect rights acquired *before* the occupation—and that it could not therefore be reopened at Lausanne. Upon this point, the Court, besides drawing attention to a clause in Article 5 which introduced a reservation, observed that it was always open to parties to amend earlier treaties.

In the result the Court decided that the contract was duly entered into, and was accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to Greece after the Balkan wars.

Judgment was given by a majority of 10 to 2, Judge Anzilotti and M. Seferiades, Judge *ad hoc*, dissenting.

JUDGMENT DELIVERED DECEMBER 12, 1934¹

The Oscar Chinn Case.

THIS case was submitted to the Court by a Special Agreement concluded between the Belgian Government and the Government of the United Kingdom on April 13, 1934. The dispute between them related to a claim made by the Government of the United Kingdom in respect of loss and damage alleged to have been sustained by Mr. Oscar Chinn, a British subject resident in the Belgian Congo, as the result of certain Government measures relating to transport on the Congo river.

The facts were briefly as follows:

Before the War transport services on the Congo river had been operated by the Belgian Government, though not to the exclusion of private enterprises. In 1921 it abandoned this business and transferred it to a company known as "Sonatra", which it formed and kept under its management. In 1925 the Sonatra Company combined with a private company and became the "Unatra", of which the state owned more than half the shares. "Unatra" was bound to keep permanently in service a fleet capable of meeting the needs of transport traffic. Its transport rates were subject to approval by the Belgian Minister for the Colonies and it enjoyed certain financial privileges from the State, and was subject to Government inspection. Private traders continued to operate ships of their own, largely for the transport of their own produce, and there was competition between them and Unatra.

Early in 1929 Mr. Oscar Chinn, who had worked in the Congo since 1927, came to Leopoldville and established there a river transport and ship-building and repairing business, and it was common ground that he was, apart from Unatra, the only fluvial transporter in the Belgian Congo who did not at the same time carry on business as a merchant or producer.

In the course of 1930 and 1931 the world economic depression was seriously affecting trade in the Congo colony, and the Leopoldville Chamber of Commerce in May 1931 appealed to the Belgian Government to lend its assistance by effecting a reduction of 50 per cent. in the cost of all transport, by granting export

¹ Series A/B, No. 63.

premiums for the benefit of traders, and by establishing government control of production. The Government did not accede to this request, but on June 20, 1931, the Belgian Minister for the Colonies issued a communication to various transport concerns whose tariffs were under Government control informing them of his decision to reduce their tariffs. The railway tariffs were thereby reduced by various percentages and in the case of Unatra a reduction to the purely nominal figure of 1 franc per ton for the downstream carriage, irrespective of distance, was imposed for a large number of commodities. The Minister's communication contained the following provision:

"The Colonial Administration requests you to open a special account, showing in particular any costs or losses arising out of the application of the above-mentioned measures. After carefully checking and auditing the figures, the Colonial Administration will reimburse you for any loss appearing in this special account, subject however to the express condition that the whole of your profits and losses, as shown in your annual statement of accounts or in your quarterly balance-sheets, show a deficit; only overhead expenses, normal amortization and interest charges may however appear on the debit side of the said profit and loss account.

"Furthermore, it is clearly understood that the charge which the Colony thus agrees to bear shall be recoverable, whenever the economic position allows of the transport tariffs being again raised."

The reductions came into force on July 1, 1931, and were stated to be for a period of three months, subject to renewal. In fact, they were renewed from time to time throughout the material period. Under the arrangement for refunding losses set out above, the Colonial exchequer paid to Unatra over 2 million francs in 1931, over 12 million in 1932, and about 7½ million in 1933.

The private fluvial transporters protested, complaining that the result of the measure was to create in effect a monopoly in favour of Unatra. Requests were made that they should be treated in the same way as Unatra, but the Government replied that the scheme of governmental assistance must be confined to undertakings over whose rates the Government had a right of control.

According to the Government of the United Kingdom, the effect of the decision of June 20, 1931, was to ruin Mr. Chinn by forcing him entirely to suspend both his transport business and his ship-building and repairing business. According to the Belgian Government this was not so, and Mr. Chinn's last cargo was carried on May 13, 1931. It was common ground that, on and after July 1, 1931, Mr. Chinn's vessels were laid up.

In October 1932, after a visit paid to the Congo by the Minister for the Colonies, a further decision was taken and was promulgated by the Governor-General of the Belgian Congo on October 3, 1932. This decision was as follows:

"NOTICE TO THE PUBLIC

"The Minister for the Colonies has decided, as from August 1st, 1932, to grant, as an advance, to all private transporters making application and offering the requisite guarantees, the refund of losses suffered as a result of transporting products the downstream rates for which have been reduced.

"This loss will be calculated per ton kilometre on the basis of the loss suffered by Unatra up to December 31st, 1932.

"Private transporters must produce the manifest on unloading, and if necessary they must send copies of the bills of lading to support the manifest.

"The guarantee must take the form of a guarantee by a bank or other solvent institution or of a mortgage on immovable property."

Mr. Chinn and five other concerns brought an action claiming damages against the Government in the Congo courts, but this was dismissed both in the Court of First Instance and on appeal. Meanwhile the Government of the United Kingdom had taken up his case and entered into negotiations with the Belgian Government with a view to a friendly settlement. These negotiations proved fruitless and the two governments then agreed to submit the case to the Court.

The questions submitted were as follows:

1. Having regard to all the circumstances of the case, were the above-mentioned measures complained of by the Government of the United Kingdom in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom?

2. If the answer to question 1 above is in the affirmative and if Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of the above-mentioned obligations, what is the reparation to be paid by the Belgian Government to the Government of the United Kingdom?

It appeared from the pleadings, and the Court noted in its judgment, that the measures complained of were primarily the decision of the Minister for the Colonies of June 20, 1931, and the Belgian Government's refusal, which ensued and was maintained until October 3, 1932, to extend the benefit of that decision to fluvial transport enterprises other than Unatra; coupled with the payments made by the Exechequer of the Colony to Unatra in pursuance of that decision.

The Court observed that the action of the Minister was a governmental act, and it was in that character that it had been impugned by the Government of the United Kingdom; as regards its scope, the Belgian Government's action had in view a substantial reduction in the transport tariffs on certain native products; it was not exclusively applicable to the Unatra Company, but applied to other undertakings such as railways.

As regards the "circumstances of the case", which the Parties expressly asked the Court to take into account, the Court summarized them as follows: In the first place was to be noted the peculiar importance of fluvial transport for the economic organization of the colony. The river Congo, owing to the magnitude and extent of its waterways, constitutes the chief highway of the Belgian colony. Penetrating, by means of its numerous tributaries, to the remotest confines of the territory, it makes it possible to exploit and turn to account the local sources of wealth of every part of the colony, so that, from the point of view of the evacuation of products to be exported, it constitutes an essential factor in the commercial activities of the colony. A special aspect of the circumstances in which the measure of 1931 was adopted is the character of the Unatra Company. Having succeeded in 1925 to the Sonatra Company, which was under the direction of the State, the Unatra Company was in form a private company; but it was charged, none the less, with the conduct of an organized public service, involving special obligations and responsibilities, with a view, primarily, to satisfying the general requirements of the colony. The fact that Unatra was responsible for these services was no bar to the enterprise of other concerns who were desirous of engaging in fluvial transport on their own account, or for the account of others. But these concerns, carrying on business freely, and having pecuniary profit as their main and legitimate object, had no claim to any guarantee of their profits from the State. They could only claim the freedom and equality guaranteed by treaty on the Congo. Finally, the circumstance which, according to the Belgian Government,

was the determining cause of the measure which it took on June 20, 1931, was the general economic depression and the necessity of assisting trade, which was suffering grievously from the fall in prices of colonial products, and of warding off the danger which threatened to involve the whole colony in a common disaster. The Belgian Government was the sole judge of this critical situation and of the remedies that it called for—subject, of course, to its duty of respecting its international obligations.

There was no dispute between the Parties as to what were the international obligations of the Belgian Government towards the Government of the United Kingdom which were material for the purpose of the present case. These international obligations were, in the first place, those arising from the Convention of St. Germain of September 10, 1919, and in the second place those resulting from the general principles of international law.

Article 1 of the Convention provides as follows:

“The signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention, a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of February 26, 1885, set out in the Annex hereto, but subject to the reservation specified in the final paragraph of that Article.

Annex.

“Article 1 of the General Act of Berlin of February 26th, 1885.

“The trade of all nations shall enjoy complete freedom:

“1. In all the regions forming the basin of the Congo and its outlets [according to the geographical boundaries].

“2. In the maritime zone extending along the Atlantic Ocean [according to the geographical boundaries].

“3. In the zone stretching eastwards from the Congo basin [according to the geographical boundaries].

“It is expressly recognized that in extending the principle of free trade to this eastern zone, the Conference Powers only undertake engagements for themselves, and that in the territories belonging to an independent sovereign state this principle shall only be applicable in so far as it is approved by such state. But the Powers agree to use their good offices with the governments established on the African shore of the Indian Ocean for the purpose of obtaining such approval, and in any case of securing the most favourable conditions to the transit (traffic) of all nations.”

Article 5 of the Convention provides as follows:

“Subject to the provisions of the present Chapter, the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article 1, as well as of the lakes situated within those territories, shall be entirely free for merchant vessels and for the transport of goods and passengers.

“Craft of every kind belonging to the nationals of the signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention, shall be treated in all respects on a footing of perfect equality.”

The Convention of Saint-Germain was the successor—so far as the Parties in the case were concerned and as regards the relations between them—of the General Act of Berlin of February 26, 1885, and of the Act and Declaration of Brussels of July 2, 1890—to which Acts it is linked up by its Preamble; but, according to the terms of Article 13 of the Convention signed by the two Governments concerned, “Except in so far as the stipulations contained in Article 1 of

the present Convention are concerned, the General Act of Berlin of February 26, 1885, and the General Act of Brussels of July 2, 1890, with the accompanying Declaration of equal date, shall be considered as abrogated, in so far as they are binding between the Powers which are Parties to the present Convention”.

The Court accordingly stated that in the present case the Convention of Saint-Germain, which both Parties relied on as the immediate source of their respective contractual rights and obligations, must be regarded as the Act which the Court was asked to apply; the validity of this Act had not so far, to the knowledge of the Court, been challenged by any government.

The Parties were not agreed as to whether paragraph 1 of Article 1 of the Berlin Act, annexed to Article 1 of the Convention of Saint-Germain, which proclaims “complete freedom” of trade for all nations, was or was not embodied in the last-named article. In the view of the Government of the United Kingdom, the clause in question constituted an integral part of that article. The Court however disagreed with that opinion, as being inconsistent with the express terms of Article 1 of the Convention; for this article only maintains in force Article 1 of the Berlin Act, in so far as concerns the clauses fixing the limits of the territories to which the Convention applies, and the last paragraph. But this question lost much of its interest in the present case, when it was observed that paragraph 1 of Article 5 of the Convention applies this principle of freedom of trade in regard to the very question of fluvial navigation with which the Court was now concerned. It was hardly open to doubt that the fluvial transport industry is a branch of commerce.

The Convention of Saint-Germain, by Article 13 referred to above, had abolished the régime of freedom of trade so far as concerns the exemption from customs duties stipulated in Article IV of the Berlin Act. But there was no evidence that the Convention intended to depart, so far as concerns commerce, from the general principle of freedom which was laid down at Berlin in regard to the river system in question. On the contrary, the signatory states of the Convention expressly referred to that principle not only—as has already been shown—in Article 5 quoted above, but also in the concluding paragraph of the Annex to Article 1 and in Article 10.

In regard to the general principles of international law, on which the Government of the United Kingdom alternatively relied, it was apparent from the written Memorials and pleadings of the Parties that the Government of the United Kingdom relied on the obligation incumbent upon all states to respect the vested rights of foreigners in their territories, and that it was this obligation which the Belgian Government was alleged to have infringed in regard to Mr. Chinn.

Relying on the international obligations incumbent upon the Belgian Government, the Government of the United Kingdom impugned the measures taken by the Belgian Minister for the Colonies on June 20, 1931, in the following respects.

In the first place, it was alleged that the Belgian Government, by enjoining a reduction of the tariffs on the Unatra Company in return for a promise of temporary pecuniary compensation, made it impossible for the other fluvial transporters, including Mr. Chinn, to retain their customers, and in consequence to carry on their business; in this way, it was argued, it enabled the Unatra Company to exercise a *de facto* monopoly which—in the view of the Government of the United Kingdom—was incompatible with the Belgian Government’s obligation to maintain commercial freedom and equality, and also with the obligation

arising out of Article 5 of the Convention of Saint-Germain, which applies those principles to fluvial navigation. The Belgian Government was alleged to have acted thus not only with a view to assisting trade in the Colony, but also in order to concentrate fluvial transport in the hands of Unatra.

Alternatively, it was alleged that the Belgian Government, by creating for the advantage of the Belgian Company Unatra a régime in the benefits of which Mr. Chinn, a British subject, was not entitled to share, was practising a discrimination, contrary to the equality of treatment stipulated in the Convention.

Lastly, in case the Court should not find that the measures taken in 1931 constituted a breach of the Convention, the Government of the United Kingdom submitted that, by making it commercially impossible for Mr. Chinn, a British subject, to carry on his business, these measures constituted a violation of vested rights, protected by the general principles of international law.

For its part, the Belgian Government submitted the following considerations:

The measures which it adopted became necessary in order to safeguard the interests of the community as a consequence of the position of colonial products in the markets of the world; it never formed part of the intentions of the Belgian Government to create a monopoly of any kind for Unatra in order to drive embarrassing competitors out of business. The measures that it took were lawful from the standpoint of international law, whether conventional or customary.

The Belgian Government further maintained that a distinction must be drawn between the sphere of navigation and that of the management of national shipping. Whereas, in the former sphere, the riparian state is forbidden to encroach on freedom of navigation, its freedom of action in the latter sphere is not subject to restriction.

Lastly, in regard to the British Government's contention based on general international law, the Belgian Government considered that no injury had been caused to already existing vested rights; at the utmost, injury may have been caused to private interests.

(a) The main argument of the Government of the United Kingdom was the alleged inconsistency between the measure taken by the Belgian Government and the principles of equality and freedom of trade and freedom of navigation.

The Court stated that according to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. But it does not follow that in all other respects freedom of navigation entails and presupposes freedom of commerce. What the Government of the United Kingdom was concerned with in this case was the principle of freedom of navigation regarded from the special aspect of the commercial operations inherent in the conduct of the transport business; for that Government had never contended that the impugned measures constituted an obstacle to the movement of vessels. For this reason the Court—whilst recognizing that freedom of navigation and freedom of commerce are, in principle, separate conceptions—considered that it was not necessary, for the purpose of the present case, to examine them separately.

The Government of the United Kingdom had relied, as regards freedom of commerce, on the first sentence of the Annex to Article I of the Convention of

Saint-Germain. As shown above, this argument was not accepted by the Court. The Court pointed out, however, that the idea of freedom of trade had not disappeared from the Convention of Saint-Germain. The Court referred to various articles in support of this proposition, and stated that whilst it was certain that the Convention of Saint-Germain was also based on the idea of commercial freedom, it was to be observed that this idea had not the same import in the Convention as in the Act of Berlin. This Act really meant by free trade the régime of the open door. By abolishing the prohibition to levy customs duties found in Article IV of the Act, the Convention had abandoned this régime; in this connexion it was also to be observed that Article V of the Act, the second paragraph of which corresponds to Article 3 of the Convention, contained a first paragraph which does not reappear in the Convention and which prohibited the granting of a monopoly or privilege in matters of trade. It could not be supposed that the contracting Parties adopted new provisions with the idea that they might lend themselves to a broad interpretation going beyond what was expressly laid down.

The Court observed that freedom of trade, as established by the Convention, consists in the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries. Freedom of trade does not mean the abolition of commercial competition; it presupposes the existence of such competition. Every undertaking freely carrying on its commercial activities may find itself confronted with obstacles placed in its way by rival concerns which are perhaps its superiors in capital or organization. It may also find itself in competition with concerns in which States participate, and which have occupied a special position ever since their formation, as in the case of Unatra. Mr. Chinn, a British subject, when in 1929 he entered the river transport business, could not have been ignorant of the existence of the competition which he would encounter on the part of Unatra, which had been established since 1925, of the magnitude of the capital invested in that Company, of the connexion it had with the Colonial and Belgian Governments, and of the predominant role reserved to the latter with regard to the fixing and application of transport rates.

The Government of the United Kingdom maintained that the reduction in transport rates together with the Belgian Government's promise temporarily to make good losses enabled Unatra to exercise a *de facto* monopoly inconsistent with freedom of trade. Was the alleged concentration of transport business in the hands of Unatra, of which the Government of the United Kingdom complained, and the fact that, because of this concentration, it was commercially impossible for Mr. Chinn to carry on his business, inconsistent with the conception of freedom of trade propounded above?

A concentration of business of this kind would only infringe freedom of commerce if commerce was prohibited by the concession of a right precluding the exercise of the same right by others; in other words, if a "monopoly" was established which others were bound to respect. There was nothing in the measure taken by the Belgian Government indicative of such a prohibition, and the Government of the United Kingdom did not contend that such a monopoly had been created. They maintained that the impugned measure had the effect of

making it commercially impossible for Mr. Chinn, amongst others, to carry on his business and thus led to what was described as a "*de facto* monopoly". In what the Government of the United Kingdom describes in this case as a "*de facto* monopoly", the Court, however, saw only a natural consequence of the situation of the services under State control as compared with private concerns. The Court also saw therein, in some respects, a possible effect of commercial competition; but it could not be argued from this that the freedom of trade and the freedom of navigation, provided for by the Convention of Saint-Germain, implied an obligation incumbent on the Belgian Government to guarantee the success of each individual concern. If the term "*de facto* monopoly" should be understood, in so far as concerns trade, navigation or the transport business, as covering all measures likely to render it difficult or impossible for others to carry on their businesses at the same prices and under the same commercial conditions, it would follow that all measures affording to customers facilities, reductions in prices, abatements or other advantageous conditions which other concerns were unwilling or unable to offer and which, after all, were calculated to promote commerce, would be incompatible with freedom of trade. Such a contention would be inconsistent with the very notion of trade; for there is nothing to prevent a merchant, a ship-owner, a manufacturer or a carrier from operating temporarily at a loss if he believes that by so doing he will be able to keep his business going.

To sum up, the Court held that having regard to the exceptional circumstances in which the measures of June 20, 1931, were adopted and to the nature of those measures, that is to say, their temporary character and the fact that they applied to companies entrusted by the State with the conduct of public services, these measures could not be condemned as having contravened the undertaking given by the Belgian Government in the Convention of Saint-Germain to respect freedom of trade in the Congo.

Even supposing that Unatra took advantage of the temporary lowering of its rates to endeavour to concentrate in its hands the business of its competitors, it could not be inferred, especially having regard to the circumstances already mentioned, that this was the motive and aim of the action of the Belgian Government. In these circumstances, it was unnecessary for the Court to consider whether, as alleged by the Government of the United Kingdom, the Belgian Government, in taking the measures which were said to have resulted in this concentration of business, was to a certain extent actuated also by motives other than the desire to assist trade during a period of depression.

On the other hand, the Court was unable to accept the general conception of the Belgian Government regarding "the management of national shipping". However legitimate and unfettered governmental action in connexion with the management and subsidizing of national shipping may be, it is clear that this does not authorize a state to evade on this account its international obligations.

(b) With regard to the alternative contention of the Government of the United Kingdom, alleging discrimination inconsistent with the equality of treatment provided for in the Convention of Saint-Germain, the Court pointed out, in the first place, that the principle of equal treatment is the characteristic feature of the legal régime established in the Congo Basin. The Convention of Saint-Germain applies this principle in most of its articles. Moreover, equality of treatment is only guaranteed to the nationals of Powers which are parties to the Convention or of Powers adhering to it. Thus, Article I of the Convention

provides that: "The signatory Powers undertake to maintain between their respective nationals . . . a complete commercial equality", &c. Article 3 guarantees to nationals of these Powers the same treatment and the same right as those enjoyed by nationals of the Power exercising authority in the territory, and thus provides for assimilation to nationals. The second paragraph of Article 11 provides that the signatory Powers will protect and favour, without distinction of nationality or of religion, religious, scientific or charitable institutions.

The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.

The Court recalled in this connexion that the treatment accorded to Unatra was based on the special position of that company as a company under the supervision of the Belgian Government. The special advantages and conditions resulting from the measures of June 20, 1931, were bound up with the position of Unatra as a company under state supervision and not with its character as a Belgian company. These measures, as decreed, would have been inapplicable to concerns not under governmental supervision, whether of Belgian or foreign nationality. The inequality of treatment could only have amounted to a discrimination forbidden by the Convention if it had applied to concerns in the same position as Unatra, and this was not the case.

In these circumstances, the Court was unable to attach any legal importance to the argument based by the Government of the United Kingdom on the fact—which was not disputed by the Belgian Government—that Mr. Chinn was the only private transporter who, like Unatra, confined his business to the transport of goods belonging to others.

On the other hand, the Government of the United Kingdom did not maintain, and there was no justification for supposing, that it was owing to his status as a British national that Mr. Chinn was not given the benefit of the arrangement accorded to the Belgian Company Unatra. In this respect, the position of the British national Mr. Chinn was not, as such, either better or worse than that of the other concerns not under state supervision; which included, according to the evidence produced, Belgian concerns and a French concern.

The Court therefore was equally unable to accept the alternative plea as to an alleged discrimination.

(c) It remained to consider the last alternative plea of the Government of the United Kingdom to the effect that the measure of June 20, 1931, by depriving indirectly Mr. Chinn of any prospect of carrying on his business profitably, constituted a breach of the general principles of international law, and in particular of respect for vested rights.

The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which was said to have led him to wind up his transport and shipbuilding businesses, was unable to see in his original position—which was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it. No enterprise—least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates—can

escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or by taking advantage of a treaty of commerce, or of an alteration in custom duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the state.

It is true that in 1932 the Belgian Government decided to grant Belgian or foreign ship-owners, whose business was endangered, advances similar to those allowed to the Unatra Company; the taking of this measure could not, however, be regarded in itself as an admission by the Belgian Government of a legal obligation to indemnify the transporters for an encroachment on their vested rights; it was rather to be ascribed to the desire of every government to show consideration for different business interests, and to offer them some compensation, when possible. The action of the Government appeared to have been rather in the nature of an act of grace.

For these reasons the Court answered the first question submitted to it in the negative, and the second question did not arise.

The judgment was given by a majority of 6 to 5. The majority consisted of Judges Guerrero, Baron Rolin-Jaequemyns, Count Rostworowski, Fromageot and Negulesco, to whom must be added Judge de Bustamante, who was compelled to leave The Hague before judgment was delivered, but who agreed with the majority. The dissentients were Judges Sir Cecil Hurst, Altamira, Anzilotti, Schücking, and Jonkheer van Eysinga.

Sir Cecil Hurst was of opinion that the Convention of Saint-Germain does not merely prohibit discrimination based on nationality, but ensures individual commercial equality and that the refusal of the Belgian Government to extend the repayment of losses to private transporters was inconsistent with such individual commercial equality and, in so far as such refusal applied to Mr. Chinn, was inconsistent with the international obligations of Belgium to the United Kingdom.

Judge Altamira also considered that the measures complained of were contrary to the equality of treatment provided for by the Convention, which was not limited to the prohibition of discrimination based on nationality.

Judge Anzilotti was of opinion that the Government of the United Kingdom were right in their main contention that the Convention prohibited governmental action, the result of which was in fact to concentrate all fluvial transport in the hands of Unatra, making it commercially impossible for other transporters, and in particular Mr. Chinn, to engage in that business. He considered, however, that the facts were insufficiently established to enable the Court to determine the issue, and was in favour of instituting an inquiry into them.

Jonkheer van Eysinga and Dr. Schücking were of opinion that having regard to the fact that Mr. Chinn's was, apart from Unatra, the only enterprise which exclusively transported the goods of others, the measure of June 20, 1931, constituted inequality of treatment within the meaning of the Convention; and further, that a *de facto* monopoly, if proved to have been established in favour of Unatra, would be contrary to the freedom of navigation guaranteed by the Convention.

None of the dissenting Judges expressed any view upon the question as to whether the measures complained of were contrary to general international law.

ALEXANDER P. FACHIRI.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1934¹ INVOLVING POINTS OF INTERNATIONAL LAW

Case No. 1. In re Piracy Jure Gentium.

THE most interesting case in the year under review bears in the reports the unusual sounding title *In re Piracy Jure Gentium* ([1934] A.C. 586). It is in fact an "advisory opinion" by the Privy Council on a question of piracy. Under Section 4 of the Judicial Committee Act, 1933, the Judicial Committee of the Privy Council may be called upon to give advice to the Crown on points of law if an Order in Council is made stating a question for them. The body which gives the opinion is the same as that which hears appeals in last resort from British courts outside the United Kingdom, and counsel are appointed to present arguments on one side and the other in the same manner as in an appeal. Such opinions are not judgments having the force of *res judicata* in any particular matter, but before any British court they would naturally carry great weight as a statement of the law—presumably hardly less weight than the advice of that body on an appeal (technically also an advice to the Crown but in effect a judgment). The analogy to the advisory opinions of the Permanent Court of International Justice is very close.

The circumstances in which the opinion was sought in this case were as follows:

A number of Chinese in two junks pursued and attacked a Chinese merchant vessel on the high seas. Before they could capture it, two other Chinese merchant vessels came to the rescue and, through their agency, the attackers were put in charge of a British war vessel, which brought them as prisoners to Hong Kong, where they were tried for piracy. Though found guilty by the jury, they were discharged by the Full Court of the Colony on the ground that actual robbery was necessary to support a conviction for piracy and here no robbery had been committed because the accused had been frustrated in their attempt.

The decision of the Hong Kong Court was based on the language of the reports of certain old English cases and of old English writers of authority. In one sense the Court had to apply English municipal law, but as that law makes "piracy *jure gentium*" a crime triable in an English court, the question was one of public international law, i.e. what constitutes piracy under international law. On the other hand, English courts, even when dealing with a question of international law, do generally, like the Hong Kong Court in this case (and to some extent under the English system of judicial precedents are bound to), follow previous English decisions as determining what the rule of international law is, when there is one which really covers the matter. The Privy Council's opinion, however, indicates that, where a question of international law arises, old English authorities should not be followed blindly as authority, *because international law is developing and changing*. This point is made more than once in the opinion and is to be welcomed as encouraging English courts in questions of international law to extend the range of their search for authority (the sources to which the Privy Council think recourse should be had are enumerated in a passage of the opinion quoted below) and not to regard old English judicial precedents as binding. An English decision on

¹ In general all cases reported in the English Law Reports for 1934 and in contemporary reports covering the same period are reviewed in this number of the *Year Book* (unless they have already been dealt with in the previous number) together with any cases in the reports for 1935 which have appeared at the time of writing (February 1935).

international law is presumably an authority, which another English court must accept only as indicating what was the rule of international law *at the date of the decision*.

The Hong Kong decision, being an acquittal, was not open to appeal but was considered by the authorities to be unsatisfactory from a practical point of view and possibly mistaken in law, and the following question was put to the Privy Council:

"Whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*?"

The Judicial Committee took a different view from the court of Hong Kong and replied that actual robbery is not an essential element and that a frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*. The Board in its opinion confines itself to answering the question submitted and, after quoting and criticizing as being inaccurate in one way or another many definitions of piracy by other authorities, declines "to hazard a definition of piracy" of its own, quoting the words of Portalis:

"We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the detail of all questions which may arise upon each particular topic."

In considering the old English authorities which appeared to limit piracy to cases where robbery had actually taken place, the Board explained that the language used was due *either* to the fact that robbery had undoubtedly been committed in the case in question and therefore the judgment must not be read as applicable to other sets of facts, *or* to a misinterpretation of an old Act of Parliament of 1538. This Act provided that offences at sea (including therefore piracy), hitherto dealt with in accordance with the civil law, should henceforth be dealt with in accordance with the common law. The reason for the change was a procedural one and there was no intention to change the rules defining the offences; but owing to the fact that the Act referred to "felonies, robberies" and robbery was a felony at common law but attempted robbery only a misdemeanour, a certain number of old writers mistakenly thought that piracy had become limited to something which was a felony at common law. The time-honoured statement (Sir Charles Hedges in *R. v. Dawson* (1696)) "Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty" was wrong in being at once too wide and too narrow. Too wide because it would cover, for instance, a robbery on a liner committed by one passenger against another, whereas there must be action against a ship (either by another piratical ship or by its own crew or passengers rising against its captain). Too narrow as excluding attempted robberies and cases of armed violence where robbery is not the motive but, for instance, vengeance or anarchistic aims.

A very large number of the definitions of piracy quoted by the Privy Council postulate the motive of plunder as an essential element in piracy¹ but the Board quote (with apparent approval on this point) five others which expressly or by implication exclude this motive as an essential element.² The Board also mention as an essential element

¹ Molloy (1646-90), *De Jure Maritimo*, Chapter 4; Casaregis (1670), *De Commercio*, LXIV. 4; Hale (1737), *Pleas of the Crown*, cap. 27, p. 305; Hawkins (1716), *Pleas of the Crown*, Vol. 1, p. 267; Blackstone, Book IV, p. 71; East, *Pleas of the Crown*, 1803, Vol. 2, p. 796; Kent (1826), *Commentaries*, Vol. 1, p. 183; Wheaton (1836), *Elements*, Pt. II, cap. 2, para. 15; Moore (1906), Vol. 2, p. 853; Ortolan (*Dip. de la Mer*), Book 2, ch. 11; *United States v. Smith* (Story J.—Wheaton 153, 161); Phillimore, *International Law*, 3rd ed., Vol. I, 1879; Hall, 8th ed., p. 314.

² Bluntsehli (1868), *Le Droit International Codifié*, Art. 343; Calvo, *Le Droit International*, 3rd ed., Vol. 2, p. 285, para. 1134; *United States v. The Malek Adhel* (1844), 2 How. 210, 232; Kenny, *Criminal Law*, 14th ed. p. 332; The report of M. Matsuda to the Codification Committee of the League of Nations, *League of Nations Document C. 196 M. 70. 1927. V*, and the replies of the Roumanian and Greek Governments.

in the crime of piracy that the accused must have acted without authorization by any state or government.

In conclusion, the following quotation from the opinion as to the sources from which international law is derived and as to the exceptional nature of the jurisdiction exercised by states in piracy cases may be quoted:

"In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various states, state papers, municipal Acts of Parliament and the decisions of municipal courts, and last, but not least, opinions of juriconsults or text-book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

"With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national, but 'hostis humani generis', and as such he is justiciable by any state anywhere: Grotius (1583-1645) *De Jure Belli ac Pacis*, vol. 2, cap. 20, § 40."

There are two more Russian Bank cases in the period under review.¹

Case No. 2. The Russian and English Bank v. Baring Bros.

The case of *The Russian and English Bank v. Baring Bros.* (51 T.L.R. 167, and 54 W.N. 224) is a decision of Clauson J. affirmed by the Court of Appeal on a claim brought in the name of the same Russian bank as has been the subject of three previous decisions reviewed in the *Year Book* for 1933 and 1934. The new decision clears up a further point of procedure, but, in order to appreciate it, it is convenient to state the effect of the three previous decisions:

(a) If the existence as a juridical person of a corporation created under the law of a foreign country is terminated under the law of the country in which it was incorporated, that corporation ceases to exist as a juridical person in the United Kingdom, although it possesses a branch there, which has continued (*de facto*) to carry on business after the

¹ *Aschkenasy v. Midland Bank* (50 T.L.R. 50, and 51 T.L.R. 34) (Roche J. and C.A.) is a third case during the year under review involving a defunct Russian bank (the Moscow Industrial Bank—the bank which was the subject of the decision in *Lazard Bros. v. Midland Bank* (see *B.Y.B.* 1933, p. 186), and which, not having a branch in the United Kingdom, cannot be wound up in that country). As, however, the case does not turn on any point of private international law, it is not necessary to deal with it. The facts shortly were that the plaintiff had in 1918 a balance in a Swiss bank, which the latter on his instructions transferred to the Midland Bank to the credit of the Moscow Industrial Bank, but it was uncertain whether the assignment had become irrevocable because it was unknown whether the Moscow Industrial Bank ever received the notice of it which the defendant English bank sent. The plaintiff claimed the money back from the defendants, and the party (if any) who could have reclaimed the money was the Swiss Bank with which the defendants had dealt..

termination of the existence of the corporation. No action can be brought in the name of the defunct corporation by the persons managing the branch, and an action commenced in that name (even before the termination of the existence of the corporation) must be stayed ([1932] 1 Ch. 435; *B.Y.B.* 1933, p. 187).

(b) The English branch of such a corporation can be wound up compulsorily under an order of the English courts made under section 338 of the Companies Act, 1929, and a liquidator appointed ([1932] 1 Ch. 663; *B.Y.B.* 1933, p. 189).

(c) The making of a winding-up order in respect of the English branch of such a defunct corporation does not have the effect of recreating the corporation as a juridical person in the United Kingdom so as to render it possible for an action stayed under (a) to be continued by the persons responsible for the bringing of that action ([1934] 1 Ch. 276; 1933 W.N. 286; and *B.Y.B.*, 1934, p. 192).

These are the principles which had previously been decided and applied in the case of this bank, and now—in 1934—the following further point has been determined.

(d) Although section 338 of the Companies Act, 1929, says that all the provisions of the Act with regard to the winding-up of companies shall be applied to a company wound up under its provisions (i.e. unregistered companies and foreign companies), and although section 342 provides that the liquidator of a company wound up under section 338 may do anything that the liquidator of a company incorporated in the United Kingdom under the Companies Act might do, and section 191 provides that a liquidator may, with the sanction of the court or of the committee of inspection, bring or defend any action in the name and on behalf of the company, nevertheless the liquidator of the English branch of a foreign corporation, which has already ceased to exist, *cannot bring an action in the name of such defunct corporation*. An action so instituted by the liquidator of this Bank in which the same claim was made as in the action referred to in (a) and (c) above was again stayed. It was held that the sections of the Act mentioned above must not be interpreted as making it possible even for the liquidator to institute an action in the name of a non-existent juridical entity. Nevertheless this does not mean that the liquidator cannot collect debts and assets due to the English branch which is being liquidated. There is another section of the Act which covers the case, section 190, which provides that where a company is being wound up by the court the court may, on the application of the liquidator, by order vest all the property of the company in the liquidator in his official name and that thereupon the liquidator may bring or defend actions relating to that property or necessary for the purposes of effectually winding up the company *in his official name*. That is to say that the liquidator of the branch of a defunct foreign corporation must obtain an order of the court under this section and then sue *in his own official name* to recover debts due to the corporation. It has taken much litigation to clear up these points.

Case No. 3. In re the Russo-Asiatic Bank.

The other Russian Bank case is *In re Russo-Asiatic Bank and In re Russian Bank for Foreign Trade*. The Russian Bank for Foreign Trade has already been the subject of a case dealt with in the *Year Book* (*B.Y.B.* 1933, p. 190), where a decision of Maugham J. in 1933 making a winding-up order in respect of the business carried on at the English branch of the Bank was discussed. Maugham J. held (as one of the grounds for the decision) that the Bank had ceased to exist as a corporation by reason of Soviet legislation, but he did not decide exactly from what date or by virtue of which Soviet decree it must be regarded as having come to an end. The Russo-Asiatic Bank was incorporated in Russia in 1895 with head office at St. Petersburg, and had established a branch in London. An order for the winding-up of the English branch of this bank had been made by the English courts and a liquidator appointed under Section 338 (1) of the Companies Act 1929 so long ago as 1926, before the decision in the *Lazard* case in 1932 (*B.Y.B.* 1933, p. 186) with regard to the Moscow Industrial Bank, and therefore before the English courts had begun to take the view that the effect of Soviet legislation

was to extinguish the legal personality of Imperial Russian banking corporations. This order had *not*, therefore, been made on the ground that the Russo-Asiatic Bank had ceased to exist as a corporation but on one of the other grounds specified in that section.¹

The present case came before the court because the liquidators of these two Banks had rejected proofs of certain debts submitted in the liquidation of both Banks by the Bank of England on behalf of the Crown, and the Bank of England applied to the court for an order that the proofs of these debts should be allowed in full. The nature and circumstances (though not the amounts) of the claims against the two banks were the same and the only material difference lay in the fact that, the question whether a foreign corporation has been extinguished by the law of the country of its incorporation being a question of fact to be decided on evidence of foreign law in each case,² there had been no decision that the Russo-Asiatic Bank had been extinguished at all, whereas in the case of the Russian Bank for Foreign Trade, the fact that it had ceased to exist in 1933 was *res judicata* but there was no decision as to the date on which it first ceased to exist. In the circumstances, it will be sufficient to deal with the case against the Russo-Asiatic Bank only and further comment is best reserved until after the digest of the case.

In re Russo-Asiatic Bank, [1934] Ch. 720. (Eve J.)

In 1915 and 1916, during the war, it was considered necessary that measures should be taken to rehabilitate the exchange position in London of Russia, and an arrangement was made by the Bank of England (with the authority of the Treasury) the Petrograd State Bank, certain banks in London and certain Russian banks, under which:

(a) these Russian banks, including the Russo-Asiatic Bank, drew upon the English banks three months sterling bills up to a certain amount;

(b) these drafts were to be sold by the drawers to the Petrograd State Bank and the State Bank forwarded them to Baring Bros., London, as its agents for acceptance by the drawees and for discounting, the State Bank disposing of the proceeds as it thought fit;

(c) the Russian Banks (drawers) were to put the English banks in funds through Baring Bros. to meet their acceptances three days before their maturity, and the State Bank guaranteed to do this if the Russian Banks failed to do so;

(d) the English Banks were to renew the bills from time to time if desired until one year after the end of the war;

(e) the State Bank advised the Bank of England of all bills bought by them under (b) and also deposited with the Bank of England Imperial Russian Treasury Bills in sterling due one year after the end of the war equal to the amount of these bills, as collateral security for the engagement under (c);

The arrangement was concluded in stages between October 1915 and March 1916, and is referred to as the "arrangement of October 1915".

In the autumn of 1917 the Bolshevik revolution broke out in Russia, and in December 1917 was issued the first of the Soviet decrees making banking a State monopoly, &c.

In order to avert the damage to the general credit of the country which might result from the non-payment of the bills, the Treasury of the United Kingdom in a letter to the Bank of England dated January 18, 1918, authorized the Bank of England to inform the English banks, acceptors of the bills, that the Bank of England, acting on behalf of the Treasury, would, to the extent that the engagement under (c) of the arrangement of October 1915 (i.e. to put the English banks as acceptors in funds to meet the acceptances three days before maturity) was not fulfilled either by the drawees or the Russian State Bank, deliver to the acceptors 3 per cent. United Kingdom Exchequer Bonds due January 30, 1930, to the amount of the acceptances, in return for the bills paid by the acceptors and an assignment

¹ Viz. that the company has ceased to carry on business, or is unable to pay its debts, &c., &c.

² *B.Y.B.*, 1933, p. 184.

by them to the Bank of England of all their rights under the bills and under the arrangement of October 1915 against the drawees and the Russian State Bank and for an undertaking by the acceptors to take such legal or other action as the Bank of England might require against the drawers or the State Bank.

On January 21, 1918, the acceptors of the bills agreed in writing to this arrangement, and in the following three months efforts were made to send notices of the assignments to the Russian Banks, drawers of the bills, and to the State Bank, guarantors, at their head offices in Russia, but owing to the conditions in Russia it is uncertain whether any of the notices reached their destinations.

The English banks, acceptors of the bills, met them in due course and received from the Bank of England United Kingdom Treasury Bills as agreed. The Treasury Bills of the Imperial Russian Government deposited with the Bank of England under (e) of the arrangement of 1915 were never at any relevant time of any value.

The Russo-Asiatic Bank had drawn, under the arrangement of October 1915, 151 bills for an aggregate value of £752,000 which matured in February and March 1918 and, in the liquidation of the English branch of this Bank, the Bank of England, with the authority and as agents of the Treasury of the United Kingdom, submitted a proof claiming this sum as assignee of the rights of the English banks against the Russo-Asiatic Bank under the arrangement of October 1915. This proof was rejected by the liquidator, and the Bank of England sought an order of the court directing the liquidator to allow the proof in full.

Evidence of the Soviet decrees relating to Russian banks and the Russian Civil Code was given by Russian lawyers called on both sides. The effect of this evidence may be summarized shortly as follows:

(a) On December 14, 1917, there was a decree of the Executive Committee of Soviets declaring the nationalization of all existing banks in Russia and the transfer of their assets and liabilities to one institution, the State Bank.

(b) On January 26, 1918, there was a decree confiscating the share capital of all joint-stock banks and declaring all shares null and void.

(c) On January 19, 1920, the State Bank was abolished and all its assets and liabilities were transferred to the Central Budget and Accounts Administration, a department of the Government.

(d) On August 3, 1921, there was issued a circular by the Central Budget Accountancy Board, stating that the transfer of the assets of the late banks to itself was now complete.

(e) In October 1923 the Russian Civil Code of October 1922 came into force, which provided that juristic persons must have statutes registered with the proper governmental authority, that their legal capacity begins from the moment of registration, and that interpretation of provisions of this code on the basis of the laws of previous régimes or the practice of its courts was forbidden (i.e. the R.A.B. was not registered under this code and its Czarist statutes would not be recognized).

It was contended on behalf of the liquidator that:

(1) The claim of the acceptors, resulting from the failure of the Russo-Asiatic Bank to put them in funds, was a claim for damages for breach of contract and not for a debt. It was based on the contract created by the arrangement of 1915 and not on the bills. If the claim was a claim for a debt, the debt was a simple contract debt.

(2) The relation between the Bank of England and the Crown was that of trustee and cestui que trust; the Bank of England were not in the transaction in the position of agents for the Crown. In relation to the Russo-Asiatic Bank the Bank of England were at most in the position of equitable assignees of the claim of the acceptors against the Russo-Asiatic Bank (see (1) above) and consequently any defence available against the acceptors, such as the Statute of Limitations, was available in the same manner against the Bank of England even if they were agents of the Crown.

(3) The claim of the Bank of England was barred by the Statute of Limitations, which began to run at the latest in March 1918 when the last of the bills matured: if there was nothing to prevent the Statute beginning to run at that date, no supervening event during the period of six years would prevent the continued running of the Statute.

(4) It could not be contended that at that date the Statute could not begin to run on the ground that the Russo-Asiatic Bank could not be sued, because the Soviet decree of December 14, 1917, was only a declaration of policy and legal authority for the dissolution of Russian banks by subsequent executive acts which would eventually bring the individual Banks to an end, and the Russo-Asiatic Bank continued to exist as a legal entity as long as a single branch anywhere continued to function without having been ordered by the Soviet Government to close down and consequently at least until the order of the English courts made in 1926 for the winding-up of the English branch.

(5) The claim (whether arising on the bills or on the arrangement of 1915 and whether for breach of contract or debt) against the Russo-Asiatic Bank of the English acceptors of the Bills was a *chose in action* legally situate at Petrograd at the Head Office of the Russo-Asiatic Bank, since the bills were drawn there and the arrangement of October 1915 was signed there on behalf of the Bank: the London branch had nothing to do with this matter. The situation of a claim arising out of contract is where the contract is made.

(6) The decree of December 1917 transferred to the State Bank the assets and liabilities of the other Russian banks and this process of transfer (after the decree of January 19, 1920) to the Central Budgets Administration was not complete till August 3, 1921.

(7) The claim against the Russo-Asiatic Bank was subjected to the transfers indicated in (6) above and consequently the Russo-Asiatic Bank was discharged under Russian law; the State Bank, to which the liability was transferred, was not abolished till January 19, 1920, and could have been sued till that date: or alternatively it became under Russian law illegal and impossible for the Russo-Asiatic Bank to fulfil its obligations to put the acceptors in funds.

(8) The liquidator only had the duty of collecting the assets and paying the debts of the London branch, and this claim was one against the Head Office in Petrograd.

It was contended on behalf of the Bank of England that:

(1) The claim was based on the obligation in the arrangement of October 1915 to put the acceptors in funds by the payment to them of sterling in London.

(2) The benefits of this obligation passed by way of equitable assignment to the Bank of England by virtue of the agreement made in January 1918 between the Bank of England and the acceptors, i.e. before the date of maturity of the bills and before the cause of action against the Russo-Asiatic Bank arose.

(3) In making this agreement in January 1918, the Bank of England acted as agents and nominees of the Crown.

(4) The Statute of Limitations does not run against the Crown and consequently did not run against the Bank of England when acting as agent or trustee for the Crown, and this is so whether the interest of the Crown is equitable or legal. Consequently this claim was not barred by the Statute of Limitations because the beneficial ownership of the claim was vested in the Crown.

Alternatively:

The Statute of Limitations did not begin to run because, when the cause of action against the Russo-Asiatic Bank arose in March 1918, the Russo-Asiatic Bank had already ceased to exist as a juridical person by reason of the Soviet decrees of December 1917 and January 1918. The decree of December 1917 abolished the private banks.

(5) The claim against the Russo-Asiatic Bank was a *chose in action* locally situate in England because it arose out of an obligation to provide sterling funds in London and could be enforced by action against the Bank there, and the arrangement of October 1915 was one governed by English law.

(6) The legislation of the Soviet Government transferring or confiscating *choses in action* does not affect those locally situate outside Soviet Russia nor could it make illegal or legally impossible the fulfilment of an obligation to be performed in England and governed by English law.

Held by Eve J.:

(1) That the Russo-Asiatic Bank ceased to possess any juristic personality in December 1917 or at the latest in January 1918 as the result of the Soviet decrees of those dates.

(2) That consequently before the cause of action arose, no action could be brought against the Russo-Asiatic Bank and the Statute of Limitations never began to run.

(3) That the cause of action against the Russo-Asiatic Bank, being one to pay sterling in London, must be regarded as being locally situate in England and was therefore not affected by Soviet legislation transferring or extinguishing it or rendering its fulfilment illegal.

(4) That, as the assignment of the cause of action to the Bank of England was an equitable assignment only, since no notice of it had reached the Russo-Asiatic Bank, the assignors, the English banks, must be joined in the application but, subject to this being done, the proof of this claim should be admitted by the liquidator.

The first point to be noted in connexion with this decision is that it was held, not merely that the Russian Bank had been extinguished by Soviet law, but also that the date of the termination of its existence must be deemed to be at the latest January 1918, i.e. as the result of the two earliest Soviet decrees. This is, from the point of view of English law, a finding of fact, but it is interesting as being the first finding of fact in the English courts giving a more or less precise date for the termination of the existence of a Russian corporation.¹

For the rest, the decision (i) applies a principle many times affirmed in the English courts in connexion with Soviet nationalization laws, namely that these laws must be recognized as applying effectively to property situate within the territory of the government enacting them, but not as affecting the title to property situated elsewhere,² and (ii) determines the legal situation of the "*chose in action*" arising in this case, i.e. a claim for breach of contract to pay money. The legal situation under English law of this species of property is governed by the general principle that it is situated in the country where the claim should properly and effectively be enforced by legal proceedings, that is to say in the case where the defendant is an individual, in the country where he ordinarily resides or, in the case of a company, the country where it carries on business. But, in this case as in many others, the defendant was a company with offices or branches in at least two countries, in both of which it could be effectively sued in respect of the claim, and in such circumstances the English courts have, in order to choose between these two possible situations for the *chose in action*, selected that country

¹ Up till this case it was possible to reconcile the decision of the House of Lords in 1925 in a contrary sense with the later decisions admitting the termination of the existence of the Russian corporations, *even as decisions on the facts*, because there were the later Soviet decrees which were not in evidence before the House of Lords in 1925 at all (see *B.Y.B.*, 1933, pp. 183-4). This case, however, proceeds on a different view of the earlier decrees.

² See cases referred to in the *Year Book*, 1933, p. 185, and also *Princess Paley Olga v. Weisz*, *B.Y.B.*, 1930, p. 233, and *Perry v. Equitable Life Assurance Society*, *B.Y.B.*, 1930, p. 234. See also Case No. 4 immediately following—application of this principle to Spanish confiscatory decrees.

where, under the contract, the obligation was to be performed or debt paid and/or by whose law the contract was governed, and have done so, although it was the country where a branch only of the company was situated and the head office was situated in the other country—see, for instance, *The New York Life Insurance Co. v. The Public Trustee* (B.Y.B., 1926, p. 217: [1924] 2 Ch. 101) and *Perry v. Equitable Life Assurance Society of the U.S.A.* (B.Y.B., 1930, p. 234: 45 T.L.R. 468).¹

The conclusion, therefore, of Eve J. in this case that this claim was situated in England where the Russo-Asiatic Bank had a branch and where the contract was to be performed, instead of Russia where the head office was and where the contract was signed, is really in accordance with the authorities, though no reference is made to them in the judgment and all that the judgment says is “although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London”—an explanation of the ground of the decision which seems rather misleading and inadequate.

Case No. 4. Banco de Vizcaya v. Don Alfonso de Bourbon y Austria.

The case of the *Banco de Vizcaya v. Don Alfonso de Bourbon y Austria* is another decision applying the principle, referred to above in connexion with Soviet nationalization decrees, that foreign laws of a confiscatory or penal character are recognized by English law as affecting only property situate within the territory of the state enacting them. In this case the foreign laws in question were decrees of the Spanish Republic against the property of the ex-King of Spain, who was a party to the proceedings in the English courts.

Banco de Vizcaya v. Don Alfonso de Bourbon y Austria, [1935] 1 K.B. 140; 50 T.L.R. 284 (Lawrence J.).

The defendant, when still King of Spain, purchased out of his own private money certain British securities, which were deposited with the Westminster Bank, London, to the order of its Madrid Branch, as agents for the defendant. After September 1923, in accordance with the instructions of the defendant, the securities were held to the order of the plaintiffs, a Spanish bank, as the defendant's agents by the foreign branch of the Westminster Bank where they were placed “under the dossier of the plaintiffs' rubric Don Alfonso de Bourbon y Austria”. On May 13, 1931, after the abdication of the defendant and the setting up of a Republic in Spain, a decree was enacted in Spain ordering the seizure of all the private property in Spain of the defendant and the delivery to the Spanish Treasury by all banks established in

¹ For other recent cases where the local situation of a debt or contractual claim has been determined, see *Richardson v. Richardson* (B.Y.B., 1928, p. 179), *London and S.A. Investment Trust v. British Tobacco Co.* (B.Y.B., 1928, p. 180), *The Bathori* (B.Y.B., 1934, p. 177), *Sutherland v. Administrator of German Property* (B.Y.B., 1934, p. 193). *Hartmann v. König*, 50 T.L.R. 114, is a decision of the House of Lords in the period under review applying this principle to a claim of German nationals under a will and/or agreement to shares in a fund situated in this country in order to determine whether it was covered by the charge on German property, rights and interests created by the Peace Treaty. Lord Buckmaster said that for the charge to operate there must be in regard to the funds “some claim capable of being enforced in H.M. Dominions and of being definitely ascertained, transferred, sold or otherwise realized”. The rest of the case turns on the nature of the claim, which had to be determined by German law and is of no general interest except that the House of Lords disagreed with the Court of Appeal in acting, when determining the rights of parties under an instrument governed by German law, upon what the latter stated “was commonly known as the view of continental jurists” as regards a principle of interpretation (different from English law), when there was no evidence of German lawyers to this effect. In the absence of such evidence, the House of Lords said, the English courts must assume German principles of interpretation were the same as the English rules.

Spain of all such property held by them on deposit, and this decree was followed on November 25, 1931, by another of the Constituent Cortes declaring the defendant guilty of high treason and an outlaw and the confiscation of his property for the benefit of the State.

The plaintiff Bank had demanded the delivery of the securities to it from the Westminster Bank on the ground that, as they were held to its order, they must be regarded as being held by it on deposit and came under these decrees and must be handed over to the Government of the Spanish Republic. The defendant also demanded their delivery to him, and since the Westminster Bank did not accede to his demand, instituted an action against it in April 1932. The Westminster Bank claimed no interest in the securities and an order was made for the trial of an interpleader issue, the Spanish Bank being made plaintiffs and the ex-King defendant. By an order of the Court of Appeal in April 1933 (49 T.L.R. 414) the issue to be tried was "That the plaintiffs in the issue are entitled as against the defendant to the said securities". The Court of Appeal struck out of the issue to be tried (as being a matter which the plaintiff Bank could not raise as interveners in interpleader proceedings) the claim "That the property, etc. in the securities has passed to the Republic of Spain".

On the trial of this issue, it was contended on behalf of the plaintiff Bank:

(1) That the securities were the property of the plaintiffs and that the defendant had only a right of action against the plaintiffs and this right of action was one governed by Spanish law, enforceable in the Spanish courts within whose jurisdiction the plaintiffs were established:

(2) That this right of action was legally situated in Spain and consequently was affected by the Spanish decrees of 1931, which had transferred it to the Spanish Republic; penal or confiscatory legislation is recognized in England as affecting property situated in the territory of the state whose legislation it is:

(3) That in this suit the claim of the plaintiffs, being for the delivery of property which belonged to them, or alternatively for the enforcement of a contractual right which the plaintiffs possessed against the Westminster Bank independently of the Spanish decrees, did not involve the enforcement by the English courts of those decrees.

It was contended on behalf of the defendant:

(1) That the defendant had a right of property in the securities as well as a right of action against the plaintiffs in Spain; these securities stood to the order of the plaintiff Bank as bailee of the defendant, and the plaintiff Bank were estopped from denying the title of their bailor to them at the time of the bailment (i.e. when they were placed to the order of the plaintiffs as the defendant's agent):

(2) The plaintiffs could only claim the securities from the defendant by relying on some change in the title to them subsequently, and for this purpose they could only set up the claim of the Spanish Government derived from the decrees of 1931:

(3) The securities were situated in England and the decrees of 1931 were penal and confiscatory decrees and the plaintiffs' claim involved the recognition of foreign confiscatory decrees as affecting the title to property in England and the execution through the English courts of foreign penal decrees, and this was contrary to English law.

Held:

(1) That the plaintiffs to succeed must prove a right to the possession of the securities as against the defendant:

(2) That the plaintiffs could not prove such a right on the basis of the contractual rights as they originally existed by virtue of the deposit of the securities to their order in September 1923 (see No. (1) of defendant's contentions above):

(3) That the plaintiffs' claim must therefore be based on the Spanish decrees and failed for the following reasons:

(a) The securities were in England, and the decrees did not purport to affect the defendant's rights to property situated outside Spain, even though they must be recognized as affecting the defendant's right of action against the plaintiffs in Spain. Further, in so far as they divested the defendant of any rights of property or possession, the decrees did not transfer these rights to the plaintiff Bank but to the Spanish State. For these two reasons the decrees, even if fully recognizable and enforceable in England, did not vest any right of property or possession in the plaintiff Bank:

Alternatively:

(b) If the Spanish decrees had purported to divest the defendant in favour of the plaintiff Bank of any rights of property or possession over these securities situated in England, the claim became one for the enforcement of these decrees in England and over property situated in England and must fail because these decrees were penal and confiscatory in character and, under English law, foreign decrees of this nature are held to be local only in their operation and to affect only property within the jurisdiction of the foreign state in question and cannot be enforced in this country.

Before leaving this case, it is interesting to note that the Italian courts appear to have reached the same conclusion in a very similar case involving property of King Alfonso in Italy in a decision given about nine months after the case discussed here.¹

Case No. 5. The Baarn.

The *Baarn* ([1934] P. 171) is the continuation of a case reviewed in the last number of the *Year Book*.² It was an action for damages in respect of a collision between ships in the territorial waters of Ecuador. The damages suffered by the plaintiff, a Chilean shipowner, consisted in the expenses he had incurred in repairing the vessel in Chile in 1931, and bills for these expenses in Chilean pesos were produced as evidence of the damages. In June 1932, while the question of the amount of damages was under consideration in the English courts, the defendant tendered to the plaintiff in Chile, and on refusal by the plaintiff to accept the tender because of the depreciation in the exchange value of the peso in the interval, deposited in the Chilean courts a sum in Chilean pesos exceeding the number expended on the repairs. The effect of the deposit in the Chilean courts was, under Chilean law, to provide indisputable evidence that the tender had been made, and perhaps also, but this is uncertain, to constitute a payment to the creditor of that amount without deciding whether the amount was or was not sufficient to discharge the claim. Under English law a court can only give judgment for a sum in sterling, and the date to be taken for the conversion of a sum in a foreign currency is, in the case of a debt, the date when it should have been paid, and in the case of a claim for damages for breach of contract or tort (as in the present case), the date when the wrong was done, or, where the damages consist of expenses incurred, the date when they were incurred (i.e. in the present case, the expenses in pesos incurred in 1931 must be converted into sterling for the purposes of an English judgment at the rate of exchange in 1931). The English Court of Appeal decided in 1933³ that, though where the claim is for a debt in foreign currency, a tender of the amount of the debt in that foreign currency before judgment will operate as a discharge,⁴ nevertheless there is no right to obtain a discharge by tender in foreign currency when the claim is for damages, even

¹ See *The Times*, February 1, 1935, judgment of Milan Court in claim by Urquijo Bank of Madrid.

² *B.Y.B.*, 1934, p. 190.

³ *Ibid.*, pp. 191-2.

⁴ i.e. although the foreign currency has fallen in relation to sterling in the interval and although the amount tendered is consequently less in value than the sum in sterling for which the English court would give judgment if no tender was made.

though the only damages claimed are expenses incurred in that foreign currency, and that consequently the deposits in Chile by the defendant did not operate as a discharge in this case.

The question later arose, however, whether these pesos deposited in Chile, which the plaintiffs could obtain in Chile (though the defendants also could take them out again), should be treated as a payment on account so as to entitle the plaintiffs only to claim now the difference between the sterling value of the deposits at the date when they were permitted to be made by the order of the Chilean judge, i.e. June 1932, and the sterling value of the pesos expended at the 1931 rate of exchange. (There was a statement in the judgment of one only of the Lords Justices of the Court of Appeal, which was erroneously reproduced in the headnote of the report of the case in the Law Reports as the opinion of the whole Court, to the effect that these deposits should be treated as payments on account.) Since June 1932, as the result of Chilean currency legislation, it would have been impossible for the plaintiffs, if they had accepted these deposits, to convert them into sterling or any other currency without the permission of a commission, which could not be obtained, and consequently these deposits could only be used to purchase commodities in Chile. It was held by the Registrar, and on appeal his decision was confirmed by Bateon J. and the majority of the Court of Appeal,¹ that these deposits should not be treated as payments on account from the defendants to the plaintiffs of which account must be taken in assessing the damages to be paid by the defendants to the plaintiffs. The deposits in Chile were not equivalent to a payment into court in England, nor could an English judgment be satisfied by payments in foreign currency in a foreign country, whatever the effect of those payments under the law of that country. Here the deposits were made not merely after the commencement of the proceedings in England but after the question of liability had been admitted and the only question to be determined was the amount of damages. What sort of payment will satisfy a claim under an English judgment is a question of procedure governed by the *lex fori*.

Case No. 6. Nihalchand Navalchand v. McMullen.

Our next case raises a question of classification in connexion with the application of the Moneylenders Acts, and certain rules of court relating to moneylenders' actions, to moneylenders carrying on business and to loans made by them outside the United Kingdom.

Nihalchand Navalchand v. McMullen, [1934] 1 K.B. 171 (Talbot J. and Court of Appeal).

The plaintiffs were moneylenders carrying on business in India and claimed under a writ specially endorsed under Order III, Rule 6, of the Rules of the Supreme Court a sum of money due from the defendant under a promissory note signed in India and payable in India in rupees.

The defendant did not enter an appearance and the plaintiffs sought to enter judgment in default (as in the ordinary case they could do upon a specially endorsed writ), but this application was refused by the Master (and on appeal by Talbot J.) on the ground that the action was one by a moneylender for the recovery of a loan and the writ did not fulfil the requirements of Order III, Rule 10—a rule applying to such actions and requiring that the writ should state that the plaintiff was a licensed moneylender and, where specially endorsed, contain detailed particulars of the loan, the rate of interest, and terms of repayment, and that a note or memorandum of the contract was made signed by the borrower and delivered to him and

¹ Greer L.J. took the view that the deposits were payments to the plaintiffs under the law of Chile and that account should be taken of them in assessing the damages, though he held in 1934 that this point must be regarded as having been decided by the majority of the court in a contrary sense in 1933.

certain other matters. Order III, Rule 10, was made as the result of the Money-lenders Act, 1927. This Act and the Moneylenders Act of 1920 contain a number of provisions designed for the protection of borrowers from moneylenders, which may be divided into four classes:

(i) provisions relating to the exercise in England of the business of a moneylender and requiring registration and licences and providing for penalties for failure to fulfil these provisions:

(ii) provisions relating to the moneylending contract and imposing certain requirements of form, such as that there should be a memorandum in writing containing full particulars of all the conditions of the contract (somewhat elaborate and technical provisions):

(iii) provisions allowing the court to open an unconscionable or oppressive contract of loan and to substitute less onerous terms when enforcing it;

(iv) provisions creating a special procedure for actions brought by moneylenders to enforce their contracts.

In the present case the plaintiff carried on business in India as a moneylender and the moneylending contract was made there, and it was contended on his behalf that none of the provisions of the Moneylenders Acts or of the Rules of Court made under those Acts applied, because all these provisions related only to actions by English moneylenders and contracts made in England. Obviously the provisions in class (i) above could not be intended to apply to foreign moneylenders, and it had already been decided that the provisions in class (iii) applied only to contracts made in England.¹ There was an undecided question of classification with regard to the provisions in classes (ii) and (iv). If they were regarded as procedure, then, on the principle that all questions of procedure are governed by the *lex fori*, they would apply to all moneylenders' actions brought in the English courts. On the other hand, if the whole of the requirements of Order III, Rule 6, applied as procedure to foreign contracts of moneylending, the effect would be that no foreign moneylender could sue in this country, because the rule requires the writ or statement of claim to show (i) that the plaintiff was a licensed moneylender, and obviously a foreign moneylender would not be licensed under English Acts, and (ii) that a memorandum of the transactions had been made in accordance with the requirements of English law, which, though not impossible, would be most improbable in the case of a foreign contract. On the technical ground that there was no actual evidence before them that the plaintiff did not carry on business in England, the Court of Appeal in this case did not decide the matter finally but held that one special rule with regard to moneylenders' actions should apply to the action brought by this moneylender, namely that the plaintiff could not enter judgment in the ordinary way in default of appearance to the specially endorsed writ, but must apply for judgment by motion or under Order XIII, Rule 16 (a Rule applying to moneylenders' actions exclusively and requiring notice of the application to enter judgment to be given to the defendant). The Court of Appeal left the question, whether all, or, if not, which, of the special requirements of Order III, Rule 6, applied to a foreign moneylender's action, to be decided at the hearing of the motion or application for judgment.

It is true, as the Court of Appeal stated, that certain statutory provisions of English law in regard to special types of contract (for instance the Gaming Acts)

¹ *Shrichand v. Lacon*, 22 T.L.R. 245: a strong decision because the words in the Act are "where proceedings are taken in any court". It was held, however, that the provision was one affecting the substance of the contract and was not procedure. *Shaik Sahied v. Socolingam Chettiar*, [1933] A.C. 342, is another case where the Privy Council used language indicating that the whole of the Act only applied to English moneylending transactions, but owing to the nature of the question which fell for decision there, this language is not necessarily conclusive.

have been held to be procedure and to have the effect of preventing an action being brought in this country upon foreign gaming contracts, even if they are valid and enforceable by the *lex loci contractus*. It is also true that the provisions in the Statute of Frauds, rendering unenforceable by action certain types of contract unless accompanied by a memorandum in writing, have also been held to be a matter of procedure and to apply to all actions brought in respect of these classes of contracts in the English courts wherever the contract was made. (*Leroux v. Brown*, a decision generally held to be wrong in principle: see *B.Y.B.*, 1934, pp. 69-71, Article on Classification in Private International Law.) In this case the Court of Appeal, while not deciding the matter, said that it appeared that some of the provisions of the Moneylenders Acts were rules of procedure like those of the Gaming Acts¹ or the Statute of Frauds, and the plaintiff could not succeed in his action unless he could establish (1) that the Acts did not apply to the contract which he sought to enforce, and (2) that no procedural rule of the *lex fori* created any impediment to his suit.

Nevertheless it would be odd that provisions of these Acts (such as those relating to the memorandum in writing), which are clearly not designed to apply to foreign contracts and have been held not to apply to them, should come to apply to them simply because they have been incorporated in Rules of Court in order to ensure that actions on the contracts of English moneylenders do not succeed if these provisions have not been observed.

Unless it can still be held that none of these provisions applies to foreign contracts (and the judgment of the Court of Appeal makes it difficult though not impossible for a lower court to take this view), it would seem right that a distinction should be drawn between those provisions which are, by reason of their essential nature, to be regarded as procedural rules applicable to all moneylenders' actions and those which are merely ancillary to rules of substance applicable only to English transactions.² One rather fears, however, in view of the tendency of the English courts, as shown in *Leroux v. Brown* and other cases, to attach greater weight to the words used and the place where they are found than to the real object and *raison d'être* of the provision, that there is a possibility that the view will be taken that whatever is in the Rules of Court is procedure and as such applicable to all actions, unless the Rules are amended, limiting some or all of their provisions to English transactions.

Case No. 7. In the Estate of Humphries.

The case of *In the Estate of Humphries* ([1934] P. 78) decides a small point of procedure. Where a deceased person leaves property in England, his property can be dealt with only under a grant of probate or administration from an English court, but if the deceased was domiciled abroad, the English courts will make a grant to the person entitled under the law of the domicile to administer the estate. They are not obliged to do so, but under the rules governing their practice he has the first and strongest title to a grant, which would only be refused to him for very cogent reasons. Where it happens, as in this case, that this person is also the next of kin under English law and consequently might apply for a grant in this capacity also, the English court will make a grant to this person as personal representative under the law of the domicile rather than as next of kin under English law.

¹ It is quite possible to find grounds for distinguishing the Gaming Act decisions, namely that it was the intention, for reasons of public policy, to render all gaming contracts unenforceable in the English courts just as, for instance, foreign contracts, which are contrary to English ideas of public policy, are unenforceable at common law. The same argument, however, cannot easily be used with regard to the Statute of Frauds or to the complicated provisions of the Moneylenders Acts.

² e.g. a distinction might be drawn between Order III, Rule 10, and Order XIII, Rule 16.

Case No. 8. In re Leguia.

The case of *In re Leguia* ([1934] P. 80) shows, however, that if the person entitled to administration under the law of the domicile—in this case a foreign executor under the will of a domiciled Peruvian, ex-President of Peru—makes no application for a grant, and the claims of creditors on the estate are being held up, the court, in the exercise of its power to grant administration to any person it thinks fit, will make a grant to another person (i.e. a creditor), though, unless, as in this case, there is evidence that the foreign executor is deliberately refraining from applying for a grant, the latter must be first cited and given an opportunity of claiming a grant to himself.

Case No. 9. Goff v. Goff.

Goff v. Goff ([1934] P. 107) is of interest as an application of a principle which is often stated to be one of the fundamental principles of English private international law. As a general rule the English courts have a discretion to refuse to entertain an action when the defendant cannot be served with the writ or originating process within the jurisdiction, though not when service is effected within the jurisdiction. The classes of cases where service out of the jurisdiction may be effected are laid down in the Rules of Court, but, even in a case which comes within these rules, the court may refuse to entertain the action. Amongst the grounds on which this refusal in the exercise of its discretion may be based, the most important are *forum non conveniens* (i.e. that the matter can best be dealt with elsewhere), that the matter is being dealt with in a foreign court, the proceedings in England being unnecessary or vexatious, or that an English judgment would be ineffective. The last mentioned was the ground in this case, and it is stated by writers (such as Dicey and Dr. Cheshire) that the principle of effectiveness is one of the general principles underlying the rules of English law with regard to jurisdiction (i.e. whether those determining the jurisdiction of the English courts or those determining the cases where an English court recognizes the jurisdiction of a foreign court). Though, of course, the English court does have to entertain many cases where its judgment is ineffective (e.g. in many cases a judgment against a person, who is served within the jurisdiction, will be ineffective if he does not reside or maintain property there) and does not always recognize a foreign court as having jurisdiction in circumstances where its judgment is effective, it is certainly true that this principle is applied directly in cases where the court has a discretionary power because service has to be made out of the jurisdiction. Generally leave has to be obtained to serve abroad, and the court may refuse it on this principle although the case is within the rules when it may be allowed, and if leave is given and in cases where it is not required, the service may still be set aside later on this ground by the court in the exercise of its discretionary power as was done in the *Goff* case. The petitioner had obtained a divorce in the English courts and now sought from the court a variation of her marriage settlement. The trustee of the settlement was a New York Bank which had no office in the United Kingdom, the trust property was in New York and the deed of settlement had been executed there and was governed by New York law. Nevertheless, even in these circumstances, under English law the court had power to vary the marriage settlement between the parties whose divorce it had decreed, the variation being regarded as a proceeding ancillary to the divorce, and service of the originating process on the trustee in New York had been validly effected according to the English rules, the case being one under Rule 29A of the Matrimonial Causes Rules, where no leave was required to serve process abroad. On the application of the trustee, however (under Order XI, Rule 30—i.e. without the entry of a conditional appearance), the service was set aside by the court on the ground that the English judgment varying the settlement would be ineffective, unless it could be enforced in New York, and it could not be enforced there because, under New York law, foreign judgments cannot be enforced in any case where the defendant has not been served personally within the jurisdiction of the court which gave the judgment.

Case No. 8. Velasco v. Coney.

The next case is one which does not require any comment other than the digest of the case.

Velasco v. Coney, [1934] P. 143 (Langton J.).

T.F.S.V., a lady of English birth and parentage, had married in 1905 the plaintiff, V., an Italian domiciled in Italy. Under the will of an uncle proved in 1910, T.F.S.V. was bequeathed a share of the residue of his property situated in England and was given power to appoint, by deed or will, any part of the income of this share in favour of her husband for his life. By a will drafted in England and executed in Italy in July 1910, in such manner as to be a valid testamentary paper according to the laws both of Italy and England, T.F.S.V. exercised this power in favour of the plaintiff V. T.F.S.V. died in 1931 domiciled in Italy, and V. now sought probate of this will. The plaintiff's application was opposed by the defendant C. (who was entitled to a share in the appointable property if no appointment was made) on the ground that the will of July 1910 had been destroyed in June 1914 in England by the English solicitor of the deceased, not in her presence but in pursuance of a letter or mandate written by her in Italy in May 1914, and that in these circumstances the will had been revoked.

Under English law there was no valid revocation of the will¹ but under Italian law the letter or mandate of May 1914 was a valid revocation of the will. It was contended for the plaintiff V. that as the will of July 1910 was not only executed according to English law but dealt with property in England, it could only be revoked in a manner recognized by English law. It was English law which applied to govern the form of the exercise of powers of appointment over property in England and not the law of the domicile as was shown by the fact that there were previous decisions, recognizing as valid appointments by wills in the English form, although such wills might not be valid by the law of the domicile. It was argued for the defendant that the will being also executed in accordance with Italian law and Italian law being the law of her domicile, the testator could validly revoke it in any manner recognized by Italian law.

Held :

That, there being no existing authority on the question, the court should follow the principle of giving effect to the intentions of the testator. There was no doubt that the testator intended to revoke the will. The revocation of the will was done in a form which was valid by the *lex domicilii* and *lex loci actus* and in the circumstances it would be wrong to admit the will to probate.

¹ Section 20 of the Wills Act, 1937: a will can only be revoked by destruction if destroyed by testator or in presence of testator and by his direction.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1933. Vols. 43-6 of the series. 3,278 pp. in all. Paris: Sirey.

The Recueil for 1933 contains twenty-six courses of lectures. In Vol. I Dr. McNair continues his work on treaties in an interesting course on *L'Application et l'interprétation des traités d'après la jurisprudence britannique*. He examines *inter alia* the relation between treaties and English law, the interpretation of treaties by the English courts, the termination of treaties (on which he finds little English authority), the effect on third parties, and British practice in the matter of ratification (which seems to have been changed in recent years without, apparently, any explanation of the reasons for the change). M. Rundstein (*La Cour Permanente comme instance de recours*) warns us against the danger of injuring the Court by premature changes in its functions. He has some interesting observations to make on the state of the law regarding the nullity of awards. M. Viehniac writes on the melancholy subject of *Le Statut international des Apatrides*. M. Castberg has a suggestive course (*Méthodologie du droit international*) on the nature and method of juridical reasoning in international law with special reference to the solution of questions not resolvable by positive legal norms. M. Barcia Trelles follows up the study which he contributed to the Recueil of 1928 with a critical but sympathetic examination of the system of *Francisco Suarez*. M. Nussbaum (*La Clause-Or dans les contrats internationaux*) concludes that the clause has been everywhere so battered by legislation and judicial decisions as to have become practically useless. M. Cardali describes the application and evolution of the *Mandat de la France sur la Syrie et le Liban*.

In Vol. II M. Arminjon (*Notion des droits acquis en droit international privé*) attacks the notion as *inconsistante, ambiguë et polymorphe*, and regards it as a pseudo-principle of no possible utility in private international law. Dr. Gutteridge (*Conflit des lois de compétence judiciaire dans les actions personnelles*) examines the present situation comparatively, and makes certain cautious suggestions for a greater measure of uniformity. Sir John Fischer Williams (*La Reconnaissance en droit international*) after an historical introduction examines the recent developments or proposed developments of recognition as a sanction. He thinks that though the difficulties are serious and the present proposals not likely to be very effective in themselves, they have the signal merit of having placed a new emphasis on the sovereignty of law in international affairs, and (it may be added) on the responsibility of statesmen for making that sovereignty good. This volume also contains courses by M. Zimmermann (*Crise de l'organisation internationale à la fin du moyen âge*), M. Straznicky (*Conférences de droit international privé depuis la fin de la guerre mondiale*), M. Udina (*Succession des États quant aux obligations internationales autres que les dettes publiques*), and M. Ripert (*Règles du droit civil applicables aux rapports internationaux*). The last contains a valuable discussion of the scope of Art. 38 (3) of the Statute of the Permanent Court.

In Vol. III Miss Dwight Reid's article on *Servitudes internationales* is interesting and informative, though it does not quite meet the difficulties of those who are not convinced of the fully "real" character of the rights concerned. M. Winiarski (*Droit fluvial international*) writes chiefly of the use of rivers for navigation purposes. He rejects any basis for the right other than the consent of the territorial

state, and is not friendly to claims to equality for non-riparian states or to the system of river commissions. M. Rühlend (*Personnes morales en droit international privé*) treats of the nationality, capacity, etc., of corporations and concludes with a short discussion of the puzzling status of *personnes morales superétatiques*. Mr. C. E. Hill (*Régime international des détroits maritimes*) treats, mainly from an historical point of view, of the régime applicable to the most important straits of the world. M. Vitta's course (*Défense internationale de la liberté et de la moralité individuelles*) is an account of the international struggle against slavery, traffic in women, and obscene publications. M. Mirkine Guetzévitch (*Droit constitutionnel et l'organisation de la paix*) discusses how far and by what means the constitution or the internal legislation of particular states guarantees a policy of peace. He thinks that the technique of peace ("*mission principale de la science du droit international*") demands, besides international pacts, a *jus gentium pacis*, parallel rules in all constitutions. M. Butter writes on the *Presse et relations politiques internationales*.

In Vol. IV M. Schindler (*Facteurs sociologiques et psychologiques du droit international*) examines the role of international law from the point of view that law is but one of the factors regulating international life, and that to understand it we must see it in the entirety of its social setting. M. Catellini (*Maîtres de l'École italienne au XIX^e siècle*) follows the example set by Prof. Pearce Higgins in a recent issue of the *Recueil* by describing a national contribution to the stock of international legal thought. M. Rechid writes on the *Condition des étrangers en Turquie*.

Finally, this volume contains the two courses on *Règles générales du droit de la paix* which have become part of the usual programme of the Academy. This year the lecturers were Prof. Salvioli and Prof. Scelle. Each of these writers gives a closely-reasoned exposition of a distinctive doctrinal position which it would be impossible to summarize in a few sentences. Prof. Scelle in particular is a thorough-going opponent of most of the presuppositions of the "classical" international law, and he, and to a lesser extent Prof. Salvioli also, moves in a realm of abstract ideas which are not very familiar or congenial to most English lawyers. Both courses have the merit of being original contributions and are provocative of thought.

J. L. B.

Tratado de Direito Internacional Publico. By Hildebrando Accioly. Vol. II. Rio de Janeiro: Imprensa Nacional. 1934.

The second volume of Dr. Accioly's book on the principles of public international law deals with questions of territory, ships and aeroplanes, and with the relations between states in times of peace, including the conclusion and interpretation of treaties. It is, like its predecessor, very clearly written and is of considerable interest as expounding the Latin-American attitude towards the questions with which it deals. The absence of an index is somewhat inconvenient, but it is, perhaps, not unreasonable to require a reader to wait until the remaining volumes are published.

H. C. G.

Teoria del Diritto Internazionale Privato (Parte Generale). By Roberto Ago, Professor of International Law in the University of Messina. 1934. Padova: Casa Editrice Dott. Antonio Milani.

This is a work of a type which is rarely met with in the English-speaking countries because it deals solely with the theoretical basis of private international

law. The traditional dislike of English lawyers for broad statements of principle is apt to lead to untoward results in the case of private international law, as witness the much belated discovery of the doctrine of Renvoi by our legal authors. It is also only very recently that so important a theory as that of "qualifications" has attracted attention from writers in this country. The comparative study of private international law is an urgent necessity and it can only be pursued if the fundamental rules of the foreign systems are properly understood. Professor Ago's learned work will be found to be of great assistance in this respect, and is to be recommended to those who are seeking to get behind the outer structure of the law in order to learn the attitude of mind of private international lawyers of other jurisdictions. The book deals primarily with the views held in Italy but it also discusses the theories held in other countries. The account given of modern tendencies in German private international law is very detailed and up to date.

H. C. G.

Il Requisito dell'Effettività dell'Occupazione in Diritto Internazionale. By Roberto Ago, 1934. Rome, Anonima Romana Editoriale. 125 pp.

This is one of the series published under the auspices of the Italian League of Nations Union. Professor Ago has covered the ground very thoroughly; his monograph is very fully documented and the Appendix contains a valuable bibliography which seems to include all the works on the subject which are of importance.

H. C. G.

Der Internationale Richter. Von Viktor Bruns. Publications de l'Institut suédois de Droit International. Uppsala and Berlin (Carl Heyman). 1934. 26 pp. (1.50 German marks).

This valuable paper on the "International Judge" contains some interesting observations on the Permanent Court of International Justice, which is the main theme of Professor Bruns's remarks. The author has been in many ways associated with the work of the Court, and some of his suggestions will doubtless be approved by many. One or two of them may be mentioned here. He points, not without some regret, to the somewhat formal fashion in which the oral argument proceeds before the Court. The judges, he says, listen with polite attention, but in detached silence; they seldom put questions and are careful not to let counsel know to what aspects of the case they attach importance. But, he complains, "there is nothing more difficult than to convince an expert of whose views one is ignorant". The following observation may be fittingly reproduced in full: "My most significant personal experience while acting as national judge before the Court has been that it is not the divergence of legal systems which prevents agreement as to what constitutes a just decision of a case. It is in that fact of agreement as to what is just that we find the basis of a community of law and jurisdiction embracing all continents. It is therefore not true to say that uniformity of civilization is the necessary presupposition of a common State system" (p. 18). Finally, it is of interest to note that Professor Bruns deprecates the tendency of some recent instruments of pacific settlement to confer upon the Court the right to decide whether a dispute is of a political or juridical nature. Such a decision, says the author, is in itself a political decision which the Court cannot render consistently with its proper function. Altogether, this short paper will well repay reading.

H. L.

Private International Law. By G. C. Cheshire, D.C.L., M.A. Oxford University Press, 1935. lx+584 pp. (25s.)

This is perhaps the most important and certainly one of the most interesting and comprehensive books on private international law published in England since the classical works of Westlake and Dicey. The need has long been felt by practitioners for a book, not indeed to replace, but to supplement those works. This need has been particularly apparent in two respects. In the first place, certain subjects have of late acquired an importance which they did not possess when Westlake and Dicey wrote, and consequently call not only for fuller treatment but in some cases for reconsideration, or at any rate restatement of the basic principles involved. Of especial prominence in this connexion are all questions appertaining to personal status and to family and personal law, which often present problems of almost baffling difficulty. Dicey, in the original edition of his great work, frankly confessed on certain points that it was not possible to give any definite rule or even any reliable guidance, and although successive editions have done much to fill up these gaps, the limitations which Dicey himself placed on his method of exposition and the somewhat rigid framework of his book have made it difficult to treat of new or doubtful points in a really satisfactory manner. It is noteworthy, for instance, that some of the most useful material in Dicey has always remained relegated to a series of appendices. One merit of the present book is that it endeavours to fill up the gaps so noticeable in former works and discusses in a spirit of constructive criticism certain problems which have always been the subject of keen controversy. These problems are approached with a fresh mind, and on many of them the author succeeds in throwing new light. He also deals with certain subjects (e.g. the problem of "classification") which have previously scarcely received any adequate discussion at all in general treatises on private international law.

In the second place, the need has been greatly felt of a book which would combine the advantages of the theoretical method of treatment adopted by Westlake with those of the positive method employed by Dicey. The latter method in some cases precluded, and in almost all cases limited, adequate theoretical discussion of difficult or doubtful points; on the other hand it lent itself to a systematic treatment of the subject, difficult to achieve in a purely or mainly theoretical work. The present book to some extent combines the advantages of both methods. If any criticism can be made it is that the author still does not give sufficient prominence to foreign rules and conceptions and that the promise of the early part of the book in this respect is not always fulfilled. Nevertheless the work is a striking advance on anything previously attempted in the way of combining a full and systematic exposition of English rules of private international law, on the basis of English decided cases, with an adequate theoretical discussion which shall take into account foreign rules and conceptions.

Dr. Cheshire has written a valuable and interesting book which will be of the greatest service to those who wish to appreciate the nature and bearing of the rules of private international law in their modern aspect.

G.

Diritto interno e diritto internazionale nell'ordinamento giuridico anglo-americano.
By Dr. Cesare Grasetti. Pavia. 1934. 73 pp.

Dr. Grasetti discusses the Anglo-American attitude towards the relation between international and municipal law and comes to the conclusion, after a full

and critical examination of the relevant English and American case law, that the maxim still holds good that "international law is part of the law of the land". Those who are able to read Italian will enjoy this little book, which is not only very attractively written, but derives added interest from the proof which it furnishes that a continental writer can handle English and American cases in such a way as to give a clear and well-reasoned account of our point of view.

H. C. G.

Grotius Annuaire international pour l'année 1934. The Hague, Martinus Nijhoff. 368 pp.

This compilation contains as usual a mass of information with regard to the international activities of the Netherlands. The part played by that country during the year 1933 in the League of Nations and other international bodies, the treaties entered into by it, and a number of other matters are dealt with in a convenient and thoroughly reliable way. In addition, the *Annuaire* contains a series of articles on special subjects, including an appreciation of the late Professor van Vollenhoven by Jonkheer van Eysinga, and reviews of the Dutch economic and monetary position.

A. P. F.

The Doctrine of "Rebus Sic Stantibus" in International Law. By Chesney Hill, Ph.D. University of Missouri Studies, Vol. IX, No. 3 Columbia, Missouri. 1934. 93 pp. (\$1.25.)

The University of Missouri Studies is a "Quarterly of Research", and Dr. Chesney Hill's monograph appears to us to be a model of what a piece of research should be. The author is very restrained in expressing his own opinions (indeed that is the only criticism we would venture to make upon his work) but by combining in this small volume an analysis of the troublesome *rebus sic stantibus* doctrine, a summary of the possibly relevant diplomatic and judicial precedents, a lengthy bibliography, and an estimate of the present position of the doctrine in international law, he has produced a piece of work which every future investigator will take as his guide and his starting-point. There is hardly any topic in international law upon which so much nonsense has been written as this one, and we must congratulate Dr. Chesney Hill upon the sanity of his judgment and the economy of his language.

As the result of his study he submits the following definition of the doctrine: "A treaty of perpetual or indefinite duration which contains no provision for revision or denunciation lapses, in the sense that stipulations which remain to be performed cease to bind the parties to the treaty, when it is recognized by the parties to the treaty or by a competent international authority that there has been an essential change in those circumstances which existed at the time of the conclusion of the treaty, and whose continuance without essential change formed a condition of the obligatory force of the treaty according to the intention of the parties."

We incline to suggest that this definition is cautious to the extent of being a slight understatement of the force of the doctrine. Of the two alternative conditions which he attaches to the operation of the doctrine, the first—recognition by the parties—virtually means that the treaty lapses by mutual consent; as to the second—declaration by a competent international authority, in which expression

Dr. Chesney Hill would probably include a conciliation commission as well as an arbitral or judicial tribunal—the machinery for obtaining such a declaration is at present very unsatisfactory having regard to the inadequacy of Article 19 of the Covenant and the limited scope of the accessions to the “Optional Clause” of the Statute of the Permanent Court. Is it not possible that the future of the doctrine may lie in the development of a distinction in its application to the semi-private-law relationships of states and to their political relationships respectively? In the former sphere, e.g. leases, servitudes, and many other non-political matters, a judicial development of the doctrine on the lines of the frustration of contracts or the dissolution of contracts *naturaliter* might perhaps be made to do justice, while in the political sphere we suggest that for a long time it will be very difficult to confine within juridical limits the ebb and flow of human affairs and the need of giving it a reasonable satisfaction. A community which has no executive and no legislature and no law of duress cannot push the doctrine of the sanctity of contract to the same lengths as England or the State of Missouri can afford to do. Peace and the *status quo* are far from being identical.

In conclusion we wish to thank Dr. Chesney Hill for a valuable contribution to the literature of international law.

A. D. McN.

Questions de principe relatives au statut international de Danzig. By Jean Hostie. Brussels: Bureau de la Revue de Droit international et de Législation comparée. 1933–34. 95 pp.

This little work originally appeared in the *Revue de Droit international et de législation comparée*; it is an interesting and scientific study of the juridical questions which have arisen in connexion with the establishment of the Free City of Danzig, including the various controversies which have occupied so much of the time of the different High Commissioners, the Council of the League and the Permanent Court. As the result of a full consideration of all the available material, the author reaches the conclusion that Danzig is a state in the international sense of the word, and that its relations with other states, including Poland, are governed exclusively by international law; and that the relationship between Danzig and Poland on the one hand and the League of Nations on the other in neither case constitutes a protectorate. A useful study of a complicated and technical subject.

W.

The Permanent Court of International Justice. By Manley O. Hudson. New York: The Macmillan Company. 1934. xxvii+731 pp. (21s.)

The Development of International Law by the Permanent Court of International Justice. By H. Lauterpacht. London: Longmans, Green & Co. Ltd. 1934. ix+111 pp. (6s. 6d.)

These two books on the Permanent Court can conveniently be treated together, though they are very different both in size and scope. Professor Hudson's work is described as an attempt at a “systematic and detailed study of the Court's entire procedure”, but it is also an historical account of the foundation of the Court and of the instruments which govern its operation. After an introductory chapter on the “Precursors of the P.C.I.J.” there is a full account of the steps which led to

the establishment of the Court, with an historical commentary on every article in the Statute and an account of the subsequent steps which have been taken to revise that instrument. There is also a commentary on each of the Rules of Court, including the revision of 1931, and a description of the Registry and finances of the Court, and the position of the Judges. Part IV contains a full account of the jurisdiction of the Court, and Part V of its procedure and practice. In each case the account is based on a consideration not only of the relevant texts, but on every incident in the nature of a precedent which is recorded in the publications of the Court, and as there is a full index the work should serve, in addition to its historical value, as a sort of "Annual Practice" for the Court. The book should be invaluable both to those who are interested in the details of the Court's work, and to those who may be concerned with cases that come before it.

The subject of Part VI of Professor Hudson's book is "The application of law by the P.C.I.J.", but this deals only with the sources of the law applicable by the Court and the methods which it has adopted for the interpretation of international engagements; "no attempt has been made to digest the Court's application of principles of substantive law". This ground is to some extent covered by Dr. Lauterpacht's book, which is based on five lectures delivered to the Graduate Institute of International Studies at Geneva; the object of the book is not to attempt to give a complete picture of the body of law which the Court has had occasion to apply and to clarify, but rather "to examine, in terms of some typical problems of the judicial function, the principal tendencies which have distinguished the work of the Court". The book should serve admirably as an introduction to the study of the work of the Court as an interpreter and (Dr. Lauterpacht would probably say) creator of international law; the task of comparing Dr. Lauterpacht's interesting and well-argued conclusions with the actual decisions of the Court, and endeavouring to decide on the extent to which the latter justify the former, would afford an admirable mental exercise, besides resulting in an enviable familiarity with the "Case Law" of the Court.

W.

World Court Reports. Edited by Manley O. Hudson. Washington: Carnegie Endowment for International Peace. 777 pp.

This is the first portion of what is intended to be a complete and continuing series of reports of the Judgments, Orders and Opinions of the Permanent Court of International Justice. The present volume covers the years 1922-6 and includes, in chronological order, the first twelve decisions of the Court in contested cases and the first thirteen advisory opinions. Each case is preceded by a short Editor's Note explaining its origin and the action taken as a result of the judgment or opinion, and also by a bibliography. Then follows the complete text of the document initiating the proceedings (but not the other pleadings), and the Court's decision together with any dissenting opinions. The volume also includes the constitutional documents of the Court and information as to its personnel and sessions, together with useful indexes.

A. P. F.

Konsularakademie zu Wien. Jahrbuch, 1934. Vienna. 150 pp.

This is an annual publication of the Consular Academy of Vienna. It contains amongst other material, short papers, bibliographies and syllabuses on selected

topics of international law. And it includes a number of interesting examination questions and practical cases for what appears to be a lively seminar conducted by Professor Verdross and Dr. Heydte.

De Jure Naturæ et Gentium Libri Octo. By Samuel Pufendorf. No. 17 of the Classics of International Law, published by the Carnegie Endowment for International Peace. Vol. I. 66a. viii+1,002 pp. Vol. II. 64a. xii+1,465 pp. Oxford University Press. 1934. (3 guineas.)

Pufendorf's minor works on jurisprudence have already appeared in this magnificent series. We now have the great work of his life in which he covered the whole field of jurisprudence from the standpoint of Natural Law. The first volume consists of a photographic reproduction of the edition of 1688, taken from a copy in the British Museum, together with a German introduction by the eminent Dr. W. Simons. The second contains an English translation by Professors C. H. and W. A. Oldfather, and the translation of Dr. Simons's introduction. It is perhaps superfluous to add that the production of the volumes is in every way excellent.

Pufendorf is the Naturalist *par excellence*. If he was not one of the small band of creative thinkers, it was his merit that he co-ordinated the thought of many others and marshalled it in a majestic system. For a century or more, despite the sarcasms of Leibnitz and Voltaire and despite the monotony of his style, Pufendorf enjoyed an immense reputation. The development of international law in the nineteenth century arose largely from abandonment of natural law and concentration upon the acts of sovereign states as the sole basis of that law. Pufendorf accordingly sank into oblivion. But with the modern onslaughts upon state sovereignty and the existence of a Court of International Justice, the ethical basis of international law has once more forced itself upon the attention of the world. Natural law has again become an object of juristic study, especially in the country of Pufendorf and amongst Catholic writers. Thus the publication of the *De Jure Naturæ* is most opportune and welcome; as is Dr. Simons's helpful introduction, with its emphasis on Pufendorf's doctrine of *socialitas* as a fundamental principle of law.

R. G. D. LAFFAN.

Kommentar der Konvention über das Memelgebiet vom 8. Mai 1924. By Jacob Robinson. Kaunas: Verlag Spaudos Fondas. 1934. 2 vols. xv+911 pp. and xv+742 pp.

Volume I is the actual commentary; Volume II is the texts of instruments, &c., dealing with the status of the Memel Territory.

Volume I opens with a foreword, saying that the book is intended to serve as a guide to the provisions of the Memel Convention. A list of sources and literature of the subject is given, followed by the text of the Convention and its annexes. Thereafter follows an analysis, article by article, of the Convention. The Statute is treated in the same way, the analysis thereof being introduced by a chapter dealing with autonomy (1) in general, (2) in the Memel Territory in particular. The other annexes to the Convention are then analysed.

An appendix is devoted to a bibliography of the law of positive autonomy (*Literatur zum positiven Autonomierecht*). There is a comprehensive subject index.

Der vorbehaltene Betätigungsbereich der Staaten (domaine réservée). By Dr. Eberhard von Thadden. Göttingen: Vandenhoeck and Ruprecht, 1934. 100 pp. (RM. 5.)

In this monograph, written from the standpoint of Nazi political and juristic philosophy, a definition is sought of those matters which by international law are solely within the domestic jurisdiction of states (Article 15, paragraph 8, of the Covenant). The author fails to find any general positive definition; on the other hand he concludes that, while it may in practice be possible to leave the matter to be decided with reference to the particular facts of each case as it arises, this is unsatisfactory from the theoretical point of view, and he therefore inquires whether any negative definition is practicable. He concludes that it would be legitimate to regard as being solely within the domestic jurisdiction of a state any matters not regulated by treaty or by a general rule of international law. Beyond a discussion of various possible limitations on this theory (e.g. the right of other states to intervene on grounds of humanity or of the common good in a matter coming by definition solely within the domestic jurisdiction of a given state) the author does not carry the question any farther, and apparently overlooks the fact that his conclusion leaves matters very much where they started. The difficulty is that it may be a keenly contested point whether in fact international law is or is not silent on a given topic, one party contending that there is a rule applicable to the matter, and the other that there is not. Such a difference of opinion cannot be resolved by any general rule and can only be settled by the decision of a tribunal.

The book, which is theoretically of some interest, is marred by the introduction of propaganda on behalf of Nazi ideology lacking any sort of relevance to the juridical questions at issue. On the political side, the work, as might be expected, is a plea for a return to nationalism and bilateralism in international politics as opposed to multilateral pacts and the collective system.

G.

La Prescription en droit international public. By P. A. Verykios, Docteur en Droit. Preface by M. Le Fur, Professor of International Law at the University of Paris. Paris: Editions A. Pedone. vi+208 pp. (Frs. 30.)

M. Verykios has produced a work which will be the starting-point of every future investigator of the place of prescription in international law. It is the first considerable work on the subject, and supplies a pressing need. It is possible, even probable, that there are more treaties embodying prescriptive periods for special cases than the author suspects, but apart from these all the sources have been thoroughly investigated. A complete bibliography of *la doctrine* classifies text-writers as for or against the acceptance of prescription, but M. Verykios very wisely is content to leave them at that. An English lawyer misses, however, an index of cases cited (something like a hundred), and the absence of cross references is a real mistake.

The work is divided into three parts, together with appendices on abandonment of territory, acquisitive prescription of international servitudes, and extinctive prescription of delayed interest payments. The first part deals with prescription in general, the second with acquisitive prescription of territory and the third with extinctive prescription of claims. The social interest simply is accepted as the basis of prescription, which is considered to be definitely recognized by

international law—not because of occasional recognition in treaties or in arbitral practice (which may not yet have founded a custom) but because it is one of those general principles of law envisaged by Art. 38 (3) of the Statute of the Permanent Court. These general principles, however, in the author's opinion, form part of international law even without recognition. So much so that any treaty which expressly denied them would be to that extent void.

This view of the nature of international law leads to surprising results in the application of prescription to territories inhabited by civilized peoples. Here an essential condition of prescription is held to be the peaceful acquiescence of the inhabitants—but further, without acquiescence there can apparently be no title, by any means, acquired. Conquest, cession, annexation, if against the will of the inhabitants, appear to give no title, which can only be gained by prescription; sovereignty must be peacefully exercised long enough to secure the assent of the inhabitants and the conviction of the international community that the new arrangement is legal. Thus the Turks have acquired Asia Minor by prescription, but they never acquired the Balkan States by any means. Germany, before 1918, had no legal title to Alsace-Lorraine, nor has Great Britain now to Cyprus or Ireland!

In dealing with acquisition of uninhabited territories and with extinctive prescription of claims the author's general treatment is excellent. But a few minor criticisms are indicated. It cannot be admitted that notification to other states is a universally necessary condition of occupation of territory. The case of the *Cayuga Indians* is taken as establishing the rule that the delay of a state in presenting a claim of private origin does not affect the claim if the private creditor himself has been guilty of no delay. But such a rule would be highly inconvenient, and it is submitted that the decision in that case is explicable by the peculiar nature of the private creditor—a dependent native tribe. The presumptions of abandonment or of fraud so often invoked are correctly seen to be mere additional justification for and not the basis of prescription, but too little weight is given to the difficulty of the defendant state in establishing its defences after lapse of time. The *Giacopini* and the *Tagliaferro* cases, important in this respect, are passed over without comment.

The author makes interesting suggestions for the fixing of elastic time-limits for the prescription of claims. His general conclusions are conveniently tabulated at the end of the book, which, on the whole, is an admirable attempt to deal comprehensively with a difficult subject.

B. E. K.

Internationale Strafgerichtsbarkeit. By Professor Dr. H. von Weber. Berlin u. Bonn: Ferd. Dummlers Verlag. 176 pp.

The interest in questions of international law has in no way diminished in Germany under the new régime. It has indeed in many aspects received a stimulus. Professor von Weber has set out in this book to give his countrymen an account and a critical analysis of the various projects which have been put forward for the creation of an international criminal jurisdiction. He discusses the proposals made by Baron Descamps, by the late Dr. Bellot for the International Law Association, and by the International Association of Penal Law. German jurists and publicists had no part in these earlier projects, because they were originally bound up with the conception of German guilt which made it impossible

for a German to look on them with any approval. While he is anxious to be objective in his examination, it is inevitable that the author should feel sceptical about the projects of the past. His treatment, however, will be valuable outside his own country, because, with admirable German thoroughness, he examines all the literature and sets out all the documents.

He concludes that an international criminal court is—in principle—needed to try certain kinds of disputes, particularly violations of the law and customs of war and of the rights of minorities. He is opposed to the jurisdiction of the court for the purpose of securing a uniform interpretation of criminal law or for the trial of international criminals. In this he will have the support of most English authorities, who share his doubts as to the ripeness of the more far-reaching proposals for super-national tribunals. He is, too, dubious of the possibility of setting up in the near future, by the agreement of states, an international criminal jurisdiction which may deal with war crimes. At the same time he recognizes the inadequacy of the existing international order; there is a gap between the international system and the actual conceptions of justice in regard to these criminal matters in which different national interests are concerned. He believes in the creation of an organ to represent world opinion, a commission composed of persons of international reputation, who would record whether the procedure was administered in due order by the national court, and he cites as an historical precedent for such a supervisory commission the delegations of observers which were sent by the interested states to the trials of the war criminals before the Reichsgericht. He advocates also the expansion of a system, already known, of semi-permanent international commissions of inquiry for the investigation of alleged violations of international law. Specific commissions in the past have done service in disposing of vexed questions of the civil law of nations between England, for example, and the United States. The actuality of his constructive proposals will appeal to the English mind. He realizes the limitations which stand in the way of an international criminal tribunal, but indicates what more modest steps may be taken.

N.B.

Sanctions and Treaty Enforcement. By Payson S. Wild, Jr. Harvard University Press, 1934. xv+231 pp. (10s. 6d. net.)

This book contains a useful analysis and historical survey of the various international sanctions current at different times, ancient (such as the giving of hostages) and modern (e.g. Article 16 of the Covenant). This is succeeded by a discussion, of political rather than legal interest, in which the author ranges himself on the side of those who believe that hope for the future lies less in establishing comprehensive sanctions for the punishment of an offender once a breach of the peace has been committed, than in building up an international system in which such a breach is unlikely to occur at all.

Some Aspects of the Covenant of the League of Nations. By Sir John Fischer Williams, C.B.E., K.C. London: Oxford University Press. 317 pp. (10s. 6d.)

This book is based on a series of lectures given at Oxford in 1933. As its title indicates, it is not intended to be an exhaustive legal commentary on the Covenant; its object is "to examine some prominent features of the Covenant and to plead for what may be called its progressive interpretation, as a statement of

principles, not always in very precise language, rather than a detailed enunciation of legal rules". The author emphasizes that "the Covenant more than any other document must be construed according to the spirit and as little as possible according to the letter", though he would probably agree that this remark is less applicable to Articles 12-17, where, as he says, "the whole atmosphere changes. The language becomes definite, precise—or as nearly precise as international documents can be—and almost legal." The book may perhaps be described as a bird's-eye view of the Covenant in the light of fourteen years experience of its working, and is intended less for the student or the lawyer (though the lawyer will find much matter for reflection in its pages) than for the ordinary intelligent person who is interested in the subject. As such the book can be recommended without reserve, and, in particular, attention may be drawn to the author's treatment of Articles like 10 and 16, where a common-sense discussion of the origin, history and real effect in existing circumstances of the provisions in question is particularly called for, and of the practical working of the unanimity rule.

W.

Labor in the League System. By Francis Graham Wilson. A Study of the International Labor Organization in relation to International Administration. California: Stanford University Press; London: Humphrey Milford, Oxford University Press, 1934. xi+384 pp. (18s.)

This is in some ways the most controversial book upon the Labour Organization which has appeared for some years. Professor Wilson's standard of accuracy in respect of facts is high, but from his judgments and appreciations many are likely to dissent. He writes not primarily as an international lawyer but as a student of the general working of the Organization, and it would therefore be inappropriate in the pages of this Year Book to discuss at length the more controversial of his views. In respect of legal issues the present reviewer finds little to criticize, but upon one issue of considerable importance he finds it quite impossible to agree with Professor Wilson, who writes at p. 100 of his book:

"The 'acceptance' of membership in the Organization by the United States in August 1934 does not lend itself easily to classification. American membership is certainly more informal than that of any of the other states in the Organization. It is, in fact, the result of an executive agreement between the President and the Labor Office, that is, between the American Executive and an international union. While this addition to the membership roll increases the divergence between the membership of the Organization and the League, it will be difficult, it seems, to cite American membership as a definite precedent for the power of the Organization to admit new members. The United States was not actually *admitted* to membership by the Conference; it was merely invited to 'accept membership'."

This passage suggests two comments. In the first place it is simply untrue that "American membership is certainly more informal than that of any of the other states in the Organization". This statement was highly questionable even when Mr. Wilson wrote his book, for in the case of members which join the organization through the acquisition of membership in the League, there is often no formal record of their joining the Organization or indeed even of their joining the League, the place of traditional diplomatic forms being taken by the notoriety of the proceedings of the Assembly and of the rule that League membership involves membership of the Organization. Since Mr. Wilson wrote, the statement has been completely falsified by the action of the Government of the United States

in formally registering with the Secretariat of the League of Nations as an international engagement the instruments in virtue of which the United States became a member of the Organization. In the second place, the distinction between the power to admit new members and the validity of an invitation to "accept membership" is a purely verbal one, and it may be said with some confidence that no one present at the International Labour Conference at the time attached the slightest importance to it. If the Conference has before it an application for membership it will, if it thinks fit, "admit". If it has before it merely an intimation that an invitation to accept membership will be well received, it will, if it thinks fit, issue such an invitation. But the above criticism, though important, relates only to half a page out of 350, and Mr. Wilson has given us a readable account of the working of the Organization in which he has made a much fuller use of both documents and personal contacts than the majority of previous writers. The chapters upon "The Nature and Structure of the Labor Organization", "The Labor Organization and the League", "The Enforcement of International Labor Conventions" and "The Revision of International Labor Conventions", are perhaps those with the greatest interest for the international lawyer.

C. W. J.

Jus Gentium Methodo Scientifica Pertractatum. By Christian Wolff. Classics of International Law. 2 vols. Oxford: Clarendon Press; London: Humphrey Milford. (36s.)

This work was the last and ninth of a series of volumes on *Jus Naturae* begun by Wolff in 1740 and concluded in 1749. The series was an attempt systematically to apply a dogmatic method to the various provinces of what at that time was called philosophy. And it is the systematic character, the methodological structure of the work which has become for a later age its most important feature.

The *Jus Gentium* is natural law literature. Wolff assumes an "eternal and unchangeable law, which nature itself has established", and which controls as well the acts of nations as those of individual men. From this law it is possible to deduce the form of the positive law, for this "does not depend upon the free will of nations, but natural law itself prescribes the method by which the voluntary law is to be made out of natural law, so that only that may be admitted which necessity demands". Again from nature—this very accommodating concept—may be deduced the necessity of a supreme state, *civitas gentium maxima*, uniting states together, as the single state together unites the individual citizens. Wolff must be looked upon as the real founder of the notion of the *civitas maxima*, for—though before him both Suarez and Grotius had treated of it—he was the first to make it the basis of the validity of international law and to endow it with sovereignty over national law.

The present edition of the work has a translation of a quite exceptional excellence. There is an informative, though rather fulsome introduction by Professor Nippold.

C. H. W.

REVIEWS OF CURRENT PERIODICALS

American Journal of International Law, Vol. XXVIII, 1934.

The January number contains Professor Hudson's review of the previous year's work of the Permanent Court of International Justice, which is always looked forward to and valued by readers of the *Journal*; an important article by Dr. Lauterpacht on "Resort to War and the Interpretation of the Covenant during the Manchurian Dispute"; a careful examination by Mr. C. L. Bouvé on a subject of topical importance, "The National Boycott as an International Delinquency"; and articles by Mr. Bert L. Hunt on "The United States—Panama General Claims Commission" and by Professor H. F. Angus on "Canadian Immigration—the Law and its Administration".

The April number begins with Dr. James Brown Scott's report upon "The Seventh International Conference of American States". It also contains articles by Professor William G. Rice, jun., upon "State Responsibility for Failure to vindicate the Public Peace", by Mr. Ernest J. Hover on "Derivative Citizenship in the United States", and by Professor Hudson on "The Factor Case and Double Criminality in Extradition". In an important article entitled "Jurisdiction following Seizure or Arrest in Violation of International Law" Professor Dickinson discusses the question whether, granted that "national courts are competent in general to adjudicate rights and duties with respect to all things or persons found within the territory which the process of the court controls", they are also competent when the thing or person has been brought within the jurisdiction in violation of international law. A powerful argument concludes in favour of a negative answer to the question put.

In the July number Professor Hyde discusses the "Legal Aspects of the Japanese Pronouncement in relation to China". Dr. Baty inquires "Can an Anarchy be a State?" Professor Pitman B. Potter examines the "Inhibitions upon the Treaty-making Power of the United States", and Professor Quincy Wright "The Narcotics Convention of 1931". Mr. Harold Tobin writes on "The Rôle of the Great Powers in Treaty Revision" and Professor Francis Wilson on "The Preparation of International Labour Conventions", which with Professor Hudson's article in the October number on "The Membership of the United States in the International Labour Organization" indicates a new international concern for the United States.

The October number also contains articles by Professor Lawrence Preuss on "International Responsibility for Hostile Propaganda against Foreign States", by Dr. Josiah T. Newcomb on "New Light on Jay's Treaty", and by Dr. A. P. Daggett on "The Regulation of Maritime Fisheries by Treaty".

The editorial comments and current notes form a valuable record and commentary upon the chief international legal events of the year and combine with the usual Chronicle of International Events, Judicial Decisions, Reviews of books and periodicals, and official Documents to place international lawyers, practical and academic, under a continued debt of gratitude to the editors and to the Carnegie Endowment. The fact that we have all become so accustomed to take for granted the help and stimulus afforded year by year by this *Journal* must not allow us to be lacking in appreciation of the labours which so large a number of our American colleagues are always ready to devote to it.

Revue Générale de Droit International. 1934.

The *Revue Générale* contains several articles on the laws of war. Dr. Joseph Kunz's article "Plus de lois de la guerre?" is a well-argued appeal for the re-examination and bringing up to date of the laws of war. While pointing out that since 1920 this question has been almost completely ignored, he argues against the propositions that it is impossible in modern conditions to humanize war, and that it is the important position which laws of war have hitherto occupied in international law which has impeded the progress of the laws of peace. He also maintains that the attempts which have recently been made to "outlaw war" do not constitute an argument against an attempt to modify the laws of war. Dr. Sandiford's article on "Anciens et nouveaux aspects du droit de la guerre maritime" is brief and somewhat superficial, and seems intended to support the proposal made by the Italian Delegation at the Oxford Session of the International Law Association, under which the exercise of belligerent rights over neutral vessels was to be confined to the national waters and the maritime belt of the belligerent states. The article on "La Visite des convois neutres" by Dr. E. Gordon of Paris is well worth reading by those who are interested in the question of belligerent and neutral rights at sea. Dr. Gordon gives a very full historical account of the question, and in his discussion of the arguments on both sides of the controversy shows a sympathy for the view traditionally maintained by Great Britain which is rare among continental authors. Dr. Gordon's suggestion for a practical solution is that a belligerent warship should be entitled to examine the ships' papers on board the convoying vessel, and that these papers "établis sous la surveillance vigilante des autorités de l'Etat neutre, ne pourraient guère être contestés et leur contenu ferait foi", but that if in the opinion of the visiting officer these papers showed a breach of the rules of neutrality as understood by his own state, he would be entitled to demand that the ship should be brought before a Prize Court. This solution hardly seems to take into account the main objection to the grant of immunity, which is the difficulty or impossibility in modern conditions of the neutral government concerned ascertaining the real origin (or, in certain circumstances, destination) of the goods on board.

Dr. Pelloux's article on "L'Embargo sur les exportations d'armes et l'évolution de l'idée de neutralité" consists mainly of a discussion of the objections which have been raised in certain quarters in the United States to the resolution proposed in the Chamber of Representatives by Mr. McReynolds, authorizing the President to prohibit the exportation of war material from the United States in circumstances where the supply of arms might facilitate the employment of force in a conflict of states. Dr. Pelloux's conclusion is that the resolution was not inconsistent either with the Constitution of the United States or with the modern conception of neutrality. Professor Decencière-Ferrandière, in an "Essai critique sur la justice internationale" argues, on historical and other grounds, that the Judge and the Legislature have always existed together, that the former cannot function without the latter, and that in so far as the Legislature is not in a position to make new laws, the Judge must do so himself, this process being described as "the imperialism of Judges". There is, however, no international legislature, and the Permanent Court has been too timid to assume legislative functions; moreover it possesses no means of enforcing its decision except public opinion, and is insufficient to replace the executive power as regards the execution of judgments. For these reasons, which are to be developed in a subsequent article,

the Professor considers the Permanent Court is a useless, and perhaps even dangerous, institution. Professor Le Fur, in an article on "L'Affaire de Leticia", examines the principal legal questions which arose, and comes to the conclusion that Colombia was in the right in every case. Dr. Mandelstam completes his consideration of "L'Interprétation du Pacte Briand-Kellogg par les Gouvernements et les Parlements des Etats signataires" by a long account of the discussions in the Parliaments of the more important countries concerned. His general conclusion is that the interpretation resulting from the previous negotiations and subsequent Parliamentary discussions of the Pact is exceedingly vague and incomplete. M. Ténékidès, Legal Adviser to the Greek Foreign Office, has an article on the "Rebus sic stantibus" principle. He obviously regards the recent evolution of this principle as dangerous and considers that it can properly be based only on the will of the parties to the treaty "... expresse ou tacite, mais réellement manifestée, et dégagée de toute idée de Pacte implicite, venant s'adjoindre automatiquement, et à l'aide d'une fiction, à tout traité". Professor Rousseau of Rennes has an interesting article on "La Sortie de la Société des Nations", a topic which, though it possesses considerable actuality at the moment, has not hitherto been the subject of much study. His view of the effect of the phrase "provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal" is that it means what it says, but that the non-fulfilment of the obligations in question does not affect the validity of the withdrawal, and that nothing in the nature of sanctions is applicable; a conclusion which indicates that the provision in question is, in practice, inoperative. On the question whether a state which has withdrawn from the League can continue to hold a mandate, Professor Rousseau, while admitting that practically all the authors who have dealt with the point answer the question in the affirmative, declares that he is not altogether convinced by their reasoning.

The Vice-President of the Permanent Court of International Justice gives an account of the Seventh Pan-American Congress held at Montevideo in December 1933. His general impression of the work accomplished is that "d'une plus juste appréciation de la véritable fonction du panaméricanisme et de la force morale et matérielle qui s'en dégage lorsque tous les Etats y apportent une loyale et active collaboration". He points out that as regards the work of codification of international law effected at the conference, the weak point of codification which is restricted to one continent is that its rules are entirely lacking in the universal authority which should constitute the essence of codification of international law, quoting in this connexion the rules adopted by the conference in connexion with the rights of foreigners and the responsibility of states. This point is illustrated by the fact that in the same number of the *Revue* there appears an article by M. Ahmed Moussa on "L'Etranger et la justice nationale" which contains views which would be difficult to reconcile with those adopted by the Pan-American Conference. Dr. Constantin Vulcan has a history and analysis of the Balkan Pact. In his view the guarantee stipulated in Article 1 of the Pact, being limited to the Balkan frontiers of the signatories, applies only to the frontiers separating two Balkan states, but that, despite the statement to the contrary made by M. Maximos in the Greek Chamber, the guarantee is applicable whatever may be the state whose action may prejudice the security of its frontiers.

An article on "Principes fondamentaux de droit international public appliqués par la Circuit Court of Appeals de New York" by Mr. Irizarry y Puente, of the

Bar of the United States Supreme Court, gives an account of decisions by that court on several questions of international law, including the recognition of states, the immunity of foreign states from process, jurisdiction on the high seas, the extra-territorial effect of national laws, and the exclusion and deportation of foreigners. There is also a note by Professor Rousseau, covering fourteen pages, on decisions of the French courts on matters of Public International Law during the years 1929-31.

Journal du Droit International. Tome LXI (1934).

This volume of Clunet contains articles on the following subjects: (1) "The Soviet State and its commercial representatives abroad", by Dr. Freund; (2) "The Franco-Soviet Treaty of January 1934 and its effect on the legal position of the Soviet State in France as regards its commercial activities", by M. Tager; (3) "The statelessness of Russian refugees", by M. Jacques Scheftel; (4) "The decisions of German courts in Russian cases", by Dr. Freund; (5) "The decisions of United States courts in connexion with the recognition of the Soviet régime", by M. Landau; (6) "'Renvoi' in English private international law", by Dr. Elkin; (7) "Options contained in contracts to elect payment in one of a number of specified currencies", by M. André-Prudhomme; (8) "The Franco-Italian Convention of 1930 for the reciprocal enforcement of judgments", by Professor J. Perroud; (9) "The law to be applied to determine status and capacity: relative merits of the law of nationality and law of domicile", by Professor Audinet; (10) "The Franco-Spanish Treaty of 1932 relating to labour questions", by Professor B. Raynaud; (11) "The legal *situs* (localisation territoriale) of a copyright, a patent, a right to a trade-mark or other forms of industrial property", by Professor Bartin; (12) "A consideration of the Italian refusal to extradite certain Croat terrorists in connexion with the murder of King Alexander", by Professor Philonenko.

In addition to these articles there are, as usual, some 600-700 pages devoted to reports of judicial decisions on points of international law in the courts of most European countries as well as a number of useful notes and documents including a French translation of the Reciprocal Enforcement of Judgments Act, 1933, and an excellent note on the interpretation of treaty provisions affecting private rights by the French courts, and a criticism of the principles adopted by the customs in the United Kingdom for the valuation of goods for the purposes of import duty.

It will be noted that five of the twelve articles (as well as a very high proportion of the judicial decisions reported) relate in one aspect or another to Soviet Russia.

Of the articles Nos. 2, 5, 11 and 12 are of more particular interest to English readers, and No. 6 is an exposition of English decisions on the *Renvoi* which the present writer thinks admirable, in spite of the fact that the article criticizes a note of his in an earlier number of the Year Book in a manner which seems to indicate that the note may have been misunderstood.

E.

Niemeyers Zeitschrift für internationales Recht. Band XXXXVIII, Heft 2-6.
Band XXXXIX, Heft 1 and 2-6.

The 38th volume of this very valuable German publication contains articles by Richard Hennig on some problems of inland navigation, by Walter Wilhelmi on the giving notice of legal proceedings to a party resident out of the jurisdiction,

by Stefan von Szászy on the Hungarian practice as to the giving of security by a foreign plaintiff, by Isidor Schwartz on State Succession, by Ernst Hoor on the enforcement of obligations to minorities in European states, and by Wilhelm Silberschmidt on questions of inheritance and the effect of marriage on property in modern (private) international law. It also includes, as usual, reports of the proceedings of the Hague Court, of international cases in municipal courts (we notice that the House of Lords in its judicial capacity is referred to as *das Parla-mentsgericht*), and international documentation.

For the 39th volume Professor Herbert Kraus is associated with Professor Niemeyer as editor. The greater part of the volume is devoted to a full documentation, but attention should be called to the two articles, each by one of the editors—Professor Niemeyer dealing with the question of the “Revision and Codification of International Law” and Professor Kraus with the conceptions of international interests and organization. The concluding words of the former article deserve quotation: “The failure of disarmament, the collapse of the League of Nations, the impotence of the Hague Court throw sufficient light on the question of the suitability (*dem Berufe*) of the present time for the revision and codification of international law.”

Zeitschrift für öffentliches Recht, Band XIV (1934).

This year more space is devoted to international law, which claims ten of the twenty articles as against six in Band XIII. Of special interest is Dr. Kunz's account of international law studies in the United States and Canada since the war. The difficulties in Canada are well appreciated and future development is confidently forecast.

A translation of Kelsen's article has already been published by the Research Bureau of the New Commonwealth Society (Series A, No. 1) under the title “The Legal Process and International Order”. The author emphasizes the inevitability of gradualness in international organization and sees the next step, before even disarmament, in the acceptance of the compulsory jurisdiction of a single court, assisted by fact-finding commissions, for all classes of disputes. The lawful use of force by individual states would then be limited to carrying out the decrees of the court or resisting force resorted to without the sanction of that tribunal.

Dr. Schiffer is more realistic in outlook, and deals with the type of problem for which the legal solution is no solution. Among these the dispute affecting honour, vital interest or independence raises once more its unloved head. The author, drawing freely on municipal law analogies, concludes that political disputes are incapable of definition and that conciliation should always be an alternative to judicial settlement of disputes.

Municipal law analogies are also discussed by Dr. Prager, who concludes that, territorial sovereignty is the equivalent of property in international law—both are “exclusive” rights.

Dr. Verosta writes of the little known Jean Dumont, a forerunner of G. F. de Martens with his collection of treaties (from A.D. 800) published in 1726. Dr. Lacambra deals with the legal philosophy of Franciscus Suarez. The general principles of treaties are discussed by Dr. Pasching, and parliamentary participation in their conclusion is considered by Dr. Szászy. Dr. Schoen discusses the Vatican State, and Dr. Svoboda asserts the supremacy of international over municipal law.

The *Zeitschrift* is to be congratulated on the additions to its editorial committee which has been doubled in number and is now truly international. That Professor Briery is one of the new members will be welcomed in this country, and provides a happy link between the British Year Book and its very slightly junior contemporary.

B. E. K.

Rivista di Diritto Internazionale (Serie III), Vol. XIII, (1934). Rome: Società Editrice Athenaeum.

The 1934 volume of the *Rivista* is, as usual, full of interest both to public and to private international lawyers. Professor Sereni contributes a valuable article on the nationality of corporations, whilst another prominent feature of this volume is a closely reasoned exposition by Signor Monaco of the theories connected with the juridical nature of the cession of territory. There are also interesting articles by Professor Ago on modern tendencies in German private international law and by Professor Enriques on international bankruptcy jurisdiction. English readers will appreciate the admirable discussion by Doctor Cesare Grasetti of the attitude of Anglo-American law towards the doctrine of Renvoi. The learned author thinks that the law of England has never adopted the doctrine—a conclusion which accords with the view now held by most English lawyers. The reports of international law cases in the Italian courts include an interesting decision of the Court of Appeal of Naples that the Italian tribunals had no jurisdiction to entertain an action brought by an employee of the British cemetery in Naples against the British Consul General. The cemetery is the property of the British Crown and is managed by the Consul General in his official capacity. So that the action was, in effect, as was held by the Italian Court, brought against a foreign sovereign.

H. C. G.

Revue de Droit International et de Législation Comparée. Tome XV, 1934.

The articles in this Review during the last year are fully up to the usual level.

Dr. Hans Kelsen, of the Graduate Institute of International Studies, Geneva, contributes an excellent article on "La Technique du droit international et l'organisation de la paix". The article contains some clear thinking and is particularly useful in these troublous times. The author adopts as his starting-point the principle that what has happened in the internal development of states affords the safest guide as to what will happen in the international development of the family of states. His postulate is that war is the sanction for breaches of international law. Gradually there will emerge a jurisdiction competent to ascertain and place on record such breaches, and to indicate and enforce the sanctions. When this happens the way is clear for states to disarm. The Briand-Kellogg Pact should have subordinated war to a jurisdiction. Defence should not be regarded as legitimate except against a state attacking or using force without authorization. The article then proceeds to develop some of the remoter possibilities but maintains that the work of the moment is to concentrate on what can be achieved in the near future.

The article by Dr. Segal of Paris on the question of the *Domaine réservé* is completed in the 1934 volume. The author lays stress on the principle enunciated

by the Permanent Court of International Justice that whether or not a particular question falls within the *domaine réservé* at any given moment depends on the then state of development of international relations; for instance, the day may come when the distribution of raw materials will become of such paramount importance to the family of nations that the question may cease to fall within the exclusive sphere of the domestic jurisdiction.

Dr. Hostie, the Secretary General of the Central Commission of the Rhine, completes his study of the question relating to the international position of the Free City of Danzig. He maintains that Danzig is a state whose relations with Poland and with the rest of the world are regulated by international law. He discusses at some length and rejects the view put forward in the separate opinion by Sir Cecil Hurst in the Polish Nationals Case (1932 A/B, No. 44) that for some purposes Article 104 of the Treaty of Versailles is still in force. For the author Sec. XI of Part III of the Treaty is executed and its provisions are spent. Article 104 is now only the historical source of the Convention of Paris.

M. Raoûl Genet contributes a study of the rules of international law relating to occupation of territory. He takes as his starting-point the 1933 notification by the French Government of the occupation of six islands in the Pacific Ocean in the Cochin-China area. After examining the rules to be found in Roman law and the views advanced by the various publicists as well as all the precedents, including the Greenland decision by the Permanent Court of International Justice in 1933, M. Genet arrives at the conclusion that the Japanese objection to the French occupation of these islands off the Cochin-China coast is not well founded.

In an article on the problem of the sources of international law M. Lea Mariggi adopts and develops the conclusions reached by Prof. Charles de Visscher in the 1933 volume on the same subject.

The volume also includes an excellent article by Professor Charles de Visscher on the right of the foreign shareholders of a company to the diplomatic protection of their own government against the state under whose laws the company was incorporated in respect of acts for which the latter state is responsible internationally, and a study by Dr. van Praag of the immunity of foreign states from the local jurisdiction and of the question of the execution of judgments against them.

Among the other articles of interest are those by Professor Jules Valéry on "Ordre public", by Professor Cavaglieri on the legal consequences of changes in territorial sovereignty, and by Professor Muuls on the extent to which under the Belgian constitution and practice the Belgian legislature participates in the conclusion of treaties.

The reviews of books and of international periodicals are as usual excellent.
C.

Nordisk Tidsskrift for International Ret (Acta Scandinavica iuris gentium). Vol. V (1934).

A great part of this volume is devoted to the lectures given at the Nobel Institute of Oslo by Dr. Raestad (Unions between States; wireless and peace; the legal position of persons without nationality; arbitration clauses in international conventions concerning literary and industrial proprietary rights; international monetary problems).

M. Pusta (Esthonia) deals with the Baltic problem. For the moment, he says,

it will be rather difficult to establish a union between the Baltic States; but the difficulties, which are both political and economic, are not overwhelming.

M. M. Hansson (former President of the Mixed Appeal Court of Alexandria) writes concerning the history and the future of the Mixed Courts in Egypt.

M. Strandgaard examines modern problems of "general average", and Mr. R. Erich (Finland) contributes an article on the ever-increasing number of pacts. Dr. Ruthenberg (Kaunas) comments on the advisory opinion rendered by the Permanent Court of International Justice in 1931 in the Polish-Lithuanian Railway Case.

There are also articles concerning the Swedish Institute of International Law and a digest of Norwegian and Swedish cases of international interest.

J. J.

The Journal of Comparative Legislation and International Law, 1934, edited by F. M. Goadby, D.C.L.

This volume of the *Journal* contains no essay on public international law. But there is a notable and welcome emphasis on private international law, a subject which tends not to be given the importance which it deserves. In an important article on "The Unification of the Rules of Conflict relating to Negotiable Instruments", Professor H. C. Gutteridge discusses whether it may not be possible to secure international agreement on this subject. He points out that the supporters of the Anglo-Saxon system will not accept the Geneva Protocols on the unification of the law of bills of exchange (a recent Yugoslav writer, M. Bayalovitch in *L'Unification du Droit de Change*, considers that they have good reason to continue their refusal), and that the unification of the rules of conflict on the question is the next best solution. Professor Gutteridge is not very hopeful, but is sufficiently optimistic to think that the attempt should be made, leaving aside the thorny question of capacity. Two other valuable contributions on private international law are those of Professor R. W. Lee and of Mr. S. Vesey-Fitzgerald, who consider respectively the Dominion and Colonial cases and the Indian and Far Eastern cases on the conflict of laws between 1928 and 1932-3.

Two other contributions approach international law. Mr. W. G. Rice considers the American case law on the status of the Indians; and Dr. F. A. Mann expounds the decisions of the German Supreme Court on the liability for debts of the former German protectorates in Africa.

The general constitutional law of the British Commonwealth of Nations is a kind of international law (cf. a recent book by F. Apelt, *Das britische Reich als völkerrechts-verbundene Staatengemeinschaft*). Professor Berriedale Keith's "Notes on Imperial Constitutional Law", which are continued in this volume, have acquired almost the status of semi-official pronouncements. Professor Keith also has a valuable article on that great constitutional innovation, "The Report of the Newfoundland Royal Commission". Also, there is the first part of a valuable and topical article by Mr. C. W. Jenks on "The Constitutional Capacity of Canada to give effect to International Labour Conventions". On administrative law there is one article only, a long review by Dr. C. T. Carr of Willis, *Parliamentary Powers of English Government Departments*. "A Century of Victorian Law", by Sir W. Harrison Moore, deals largely with public law.

On Jurisprudence there are three valuable contributions. "Case Law in France" is compared with case law in England by Dr. Marc Ancel, who had

previously shown himself to be fully competent to make the comparison. In "Modern Ethnological Jurisprudence in Theory and Practice", the Editor of the *Zeitschrift für vergleichende Rechtswissenschaft* puts in a plea for ethnological jurisprudence. Mr. J. H. Driberg discusses a cognate subject in "The African Conception of Law".

The Editor writes on "Moslem Law in the Egyptian Mixed Courts", and Sir Maurice Amos on "Perpetuities in French Law"; and there are articles on the Soviet Maritime Code and "Germanic Law versus Roman Law in National Socialist Legal Theory".

If we add to these articles a series of valuable notes, excellent bibliographical notices which are written by a team of experts and which give an emphasis to continental literature which English readers find particularly valuable (we wish it could be made even more complete), and above all the valuable surveys of the legislation of the British Empire, the peculiar position which the *Journal* occupies in the British legal world becomes obvious. We wish that the funds of the Society would permit of a quarterly publication, with the surveys of legislation as supplements.

W. I. J.

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(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de la Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., de sci. dip. et pol. = Revue de droit international, de sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; Z. f. aus. int. Privatrecht. = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

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